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IN THE
UNITED STATES SUPREME COURT

SHERRY LINTZ; KEITH LINTZ, SR; BRIAN ALLEN JACOBS minor, by next friend Sherry Lintz; KEITH JAMES LINTZ, JR., minor, by next friend Sherry Lintz; RICHELE NICOLE JACOBS, minor, by next friend Sherry Lintz,
Plaintiffs-Appellants

versus

LINDA J. SKIPSKI and DEPARTMENT OF SOCIAL SERVICES
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it clearly established that the appellees, as state actors, had an obligation to protect the minor plaintiffs from injuries inflicted by the foster family when the state took the minors into its custody, thereby foreclosing the minors' opportunity and capacity to care for themselves and to get help from others?

2. Did the Sixth Circuit Court of Appeals err in concluding that a social worker was not deliberately indifferent to the needs of the children where she (1) failed to immediately remove the children from the foster home after sexual abuse was reported and evidence of repeated sexual abuse and physical threats was available to her; (2) failed to report the allegations to law enforcement authorities when required by state law to do so; and (3) failed to institute safeguards to insure the children's safety when she left the children in the abusive environment?

3. Did the Sixth Circuit Court of Appeals err in concluding the district court properly applied standards required for summary judgment where the district court made factual conclusions and failed to give Petitioners every reasonable inference based on the facts presented?

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OPINIONS BELOW

Opinion and Order of the U.S. District Court for the Western District of Michigan, November 25, 1992 dismissing Petitioners' claims is appended.

Opinion of the U.S. District Court for the Western District of Michigan, February 22, 1993 denying Petitioners' motion for reconsideration is appended.

Opinion of the Court of Appeals, May 25, 1994 affirming the District Court is recommended for full text publication and is appended.

The Court of Appeals Order denying Plaintiffs' petition for rehearing dated June 20, 1994 is appended.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution

42 USC §1983 Civil Action for Deprivation of Rights

Child Care Organizations MCLA 722.115(1)

Child Protection MCLA 722.623 et seq.

JURISDICTIONAL STATEMENT

The relevant constitutional provision in this appeal is the Fourteenth Amendment to the United States Constitution. The relevant portion of the constitutional provision is printed in the Appendix to this Petition.

This is a civil rights action arising under 42 USC §1983 and the United States Constitution and, therefore, jurisdiction for the filing of this action was invoked under 28 USC §1331. 1343(3)&(4) and in the Sixth Circuit Court of Appeals pursuant to 28 USC §2106 based upon federal question.

The jurisdiction to review the judgment of the Sixth Circuit is pursuant to 28 USC §1254(1)

STATEMENT OF THE CASE

A. Lower Court Proceedings

Petitioners filed this civil rights action in the United States District Court for the Western District of Michigan pursuant to 42 USC §1983 and the Fourteenth

Amendment to the United States Constitution arising from sexual and physical assaults upon the minor Petitioners while they were in the Michigan foster care system.

The district court granted Respondents' motions for summary judgment on December 4, 1992. [R.87,88] The motions were based on failure to state a claim [R. 46, 91]. The district court ruled, at least in part, as a motion for summary judgment when it held Respondents were protected by governmental immunity because the right to be free from physical abuse in a foster home was not clearly established in 1987. Petitioners filed a motion for reconsideration which was denied February 23, 1993. [R. 94, 95] With its denial the district court issued a second opinion, this time holding that a child's right to be free from physical and sexual abuse in a foster home was clearly established in May, 1990 by the Sixth Circuit's decision in *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir.) *cert. denied* 498 U.S. 67, (1990) but ruled Respondents acted appropriately and were not liable to Petitioners. [R.94]

Petitioners appealed the decision to the Sixth Circuit Court of Appeals, seeking reversal of the district court's dismissal of this action. The Sixth Circuit affirmed the lower court in its opinion entered May 25, 1994. Although Petitioners sought reconsideration, it was denied on June 16, 1994. All orders and opinions referenced above are provided in the Appendix.

B. Statement of Facts

Plaintiff-Appellant Sherry Lintz is the natural parent of minor Appellants Richele Jacobs, Brian Jacobs, and Keith Lintz, Jr. (hereinafter "Keithie") Appellant Keith Lintz, Sr. is the natural father of Keith Lintz, Jr. On May 22, 1987, the minor Plaintiffs were removed by Cass

County Department of Social Services from their natural parents' home, allegedly because Sherry was a poor housekeeper. The children were placed by caseworker, Defendant-Appellee Linda Skipski, with foster parents Shirley and Ken Krause. While these children were wards of the state and living with the Krause foster family, all three children were repeatedly sexually assaulted and verbally and physically threatened and abused by the Krause's son, Dale Krause. The numerous atrocities included the following:

(1) All three minor Petitioners were repeatedly threatened with brass knuckles, a switch blade and a gun, including placing the gun near their faces. [R.36:Exhibit No. 1]

(2) Dale hit Brian with the brass knuckles, making Brian say that he had hit his head on a log. [R.36]

(3) Dale repeatedly told Brian he wanted to "fuck" Richele. Dale threatened Brian with physical violence if he repeated Dale's statements.

(4) On one occasion, Dale chased the boys with a butcher knife. [R.36]

Dale's parents knew he had these weapons and had exhibited unhealthy behaviors toward the children.

The sexual assaults included:

(1) Dale sexually assaulted Keithie by making him suck on Dale's penis, threatening physical harm if Keithie told anyone. Dale also forced Keithie to allow him to suck on Keithie's penis. [R.36]

(2) Dale fondled Brian's penis and made Brian play with himself while Dale watched.

(3) Dale would enter Richele's bedroom at night and repeatedly lick Richele's vagina. He assaulted this little girl by using his finger to penetrate her vagina. [R.36:Exhibit No. 1] He further terrified her by threatening to penetrate her vagina with his penis. [R.36:Exhibit No. 1]

(4) He often kissed Richele open mouthed and using his tongue. [R.36:Exhibit No. 1]

(5) When the children played outside, Dale pushed Richele to the ground, fondling her private areas, making her suck his penis and threatening to hurt Richele or kill her with his brass knuckles or with his knife if she told anyone what he was doing to her. [R.36:Exhibit No. 1]

(6) Richele reported: "Dale made me suck his private" [R.36:Exhibit No. 1]

(7) Brian was awakened in his sleep on one or more occasions because of Dale standing between his legs and fondling his thighs. [R.36]

The minor children lived in fear of Dale and the acts he inflicted upon them. They were frightened to tell anyone for fear of their lives. These children were sexually assaulted and physically threatened while their care was entrusted to the Cass County Department of Social Services and its foster home.

Linda Skipski and the Cass County Department of Social Services placed the children in the Krause foster

home with the knowledge that there had been previous criminal sexual misconduct in the foster home by the Krause's eldest son, Robert. In 1984, Robert Krause pleaded guilty to criminal sexual conduct in the second degree for assaulting a five-year-old female foster child in a van which Mr. Krause was driving at the time. The minor child he assaulted was the five-year-old foster child of his aunt and uncle.

Respondents were put on notice as early as June 1988 that the children were in danger. [R.70: Exhibit No. 2]

> June 16, 1988:
> Shirley Krause advised therapist Robin Smietanka that Brian and Keithie were acting out in a sexual manner--Brian was touching Keithie's genitals. [R.70: Exhibit No. 2] Shirley reported that she felt Brian was doing this for attention from Dale. [R.70: Exhibit No. 2]

Despite these observations and this interesting statement by Shirley Krause, no investigation was made and no reports were filed.

> June 16, 1988:
> Shirley Krause also advised Defendants that Keithie (a 3 year-old-child!) frequently masturbated at night. [R.70: Exhibit No. 2]

Again, no investigation was initiated.

> Sept. 12, 1988:
> Sherry Lintz advised the Respondents that the children were telling her they were being hurt by Dale Krause [R.70: Exhibit No. 2]

Still no report was made by DSS, the foster family, the therapist or Skipski. [R.82: Exhibit No. 4, page 60, 66, 68] The children were calling out for help, and the call was ignored. Further warning signs of sexual molestation appeared.

> March 1990:
> Brian was disciplined in school for trying to kiss a girl and putting his hands all over the girl's body. Brian was only in the first grade. [R.70: Exhibit No. 3]

> July 1990:
> The therapist notes in her files that Shirley Krause advised she heard Keithie saying "stop . . " after Brian had crawled into bed with him. [R. 70: Exhibit No. 2]

No investigation was made. No one was questioned or investigated. The children were not questioned. Again, no report was generated. The therapist testified in deposition that she told Skipski, the case worker about these incidents reported by Shirley Krause and Sherry Lintz. [R.70: Exhibit No. 2] However, these warning signs went unheeded by Respondents.

> October 2, 1990:
> Foster Mom Shirley Krause again reported sexually acting out behavior between the boys stating that she found Brian in Keithie's bed saying to Keithie, "you take my pants down and I'll take your pants down." [R.70: Exhibit No. 2]

Once again, no report was made and no investigation or questioning occurred. [R.82: Exhibit No. 2]

> October 8, 1990:

> Keithie told the therapist that he had sucked Dale's private parts after Dale promised him $2 and an opportunity to play Dale's Nintendo game.

Respondents couldn't completely ignore the point blank allegations made by the children. The children were briefly questioned. [R.82: Exhibit 2, page 61] The manner in which they were questioned underscores their apprehension in disclosing the horrors inflicted upon them while in foster care. The response these allegations received is incredible. The children were brought in and questioned in front of Shirley, Linda and the other kids. This set the tone. Shirley was sent to get Dale and as the children were taken out of the room, Dale was taken in. After this brief questioning, the children were sent home with Shirley and Dale where they were subjected to further interrogation by distraught and angry foster parents at a family meeting around the kitchen table. [R.82: Exhibit No. 10]

Despite these allegations, the children were forced to remain in the Krause foster home. Important in this case is that the usual practice of Cass County DSS is to immediately remove the children or the perpetrator when allegations arise in a natural family setting.

The following critical facts are unrefuted in the case below, and Petitioners are entitled to every reasonable inference to be drawn therefrom:

1. Three minors, ages 2, 4 and 5, were removed from their natural mother and put into foster care in 1987.

2. The children complained in September of 1988 that Dale, the foster parents' 14 old son, was hurting them. [R 70, Exh. 2] No investigation

was conducted by the Michigan Department of Social Services or anyone.

3. On October 8, 1990, Keithie, then 5 years of age, reported to his therapist and caseworker Defendant-Appellee Linda Skipski that Dale made him suck Dale's penis after promising to give him two dollars and to let him play Nintendo. [R.82: Exhibit 2]

4. Defendant-Appellee Skipski did not comply with state mandated reporting requirements. [R. 82; MCLA 722.623, et seq.] She delayed in telling the prosecutor for 11 days and then never called the police after the prosecutor instructed her to do so. [R. 82, Exh. 4, p. 68; Exh. 9, p. 36]

5. Dale Krause initially denied the allegations of physical and sexual abuse and was never questioned again by any Department of Social Service or law enforcement agency. [R 81, Exh. 4, p.63] He admitted possessing brass knuckles, a switch blade and several guns.

6. The children were not taken to a medical doctor. Shortly afterwards, the therapist stopped treating them. No replacement counseling or treatment was initiated.

7. After the sexual abuse was reported to the caseworker and the therapist, the children were returned to the Krause foster home where they were confronted and interrogated by very angry foster parents. [R 82, Exh. 2 & Exh. 10, p. 24] The children were returned to the foster home even after they told the

Respondents they were afraid of Dale. [R.82: Exh. No. 1]

8. Foster Mother Shirley Krause and Dale Krause both denied that any instructions for safeguards were ever given to them after the allegations of sexual abuse were made. [R.82: Exh. No. 5: at 70, 75; R.82: Exh. No. 6: at 117]

The Questions Presented Are Substantial

A.

The Lower Court Erred Since Respondents Are Not Entitled to Qualified Immunity as Petitioners' Rights Were Clearly Established at the Time of the Incidents Alleged in Their Complaint.

Social Services officials and personnel have a legal duty to wards in their custody to exercise such care for their personal safety as a person of ordinary prudence would use in the same circumstances to avoid unreasonable risks of foreseeable harm to those individuals. Courts have generally required more diligence and caution when applying this principle to foster care children, especially in those situations where the potential for serious harm is heightened. *See Smith v. Archbishop of St. Louis*, 632 S.W.2d 516, 521-22 (Mo. App. 1982).[1]

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[1] Several studies have concluded that the rates of child abuse and neglect in foster care facilities may be greater than those for children in the general population. See, P. Ryan & E. McFadden, *Nat'l Foster Care Education Project: Preventing Abuse in Family Foster Care 11* (1986); Vera Institute of Justice, *Foster Home Child Protection 63-*

Abuse inflicted by any member of the foster family to these minors goes straight to the heart of the state's role in determining the children's fate.

Foster care commitment usually results because the state believes the parents are incapacitated in some way to play the role of the natural protector. Instead, the state assumes that responsibility when it removes the children from the parents' home. Once the state deprives a foster child of his or her liberty by taking the child into its legal custody and displacing the role of the natural parents as the protectors, the foster child no longer lives in a free society regardless of whether she lives in a state institution or in a state sponsored foster home. Once the children are in the foster care system, the state may determine placement virtually at will. Legally and practically, Respondents replaced the natural parents of these children as their sole source of protection. The state, therefore, has imposed a limitation on the children's freedom to act on their own behalf through the agency of their natural parents. The state already had pierced the veil of family privacy and stepped over the boundary between private and public that is marked by the custody line in *DeShaney v. Winnebago County DSS,* 109 S. Ct. 998 (1989).

The state entrusted physical custody only to the foster parents whom it identified, licensed, approved, and supervised. The state retained the authority to remove the minors from the foster home at any time. Foster care exists to protect the child -- the very function that failed in this case.

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64 (Feb. 1981).

Michigan DSS employees are vested with broad powers regarding who may be certified as a foster parent and which child will go to which home. Before placing a child in foster care, DSS must be "satisfied as to the need for a child care organization, its financial stability, the good moral character of the applicant, and that the services and facilities are conducive to the welfare of the children." *MCLA 722.115(1)* Agency regulations required DSS to choose a foster home where there is a "wholesome atmosphere" and where the persons in charge are of "suitable temperament to care for children" and understand the needs of the children.

These children depended on their foster parents and on the state for their care and protection. They were betrayed by the system that promised to protect them, when it removed them from their mother's care and placed them with a dysfunctional family.

In *Harlow v. Fitzgerald*, 457 US 800, 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982), the Supreme Court, adopting an "objective" standard held:

> We therefore hold that government officials ..... are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.*

Harlow only offers protections where the alleged rights of the individual are not clearly established.

By assuming custody of the child and by making decisions about the child's care, the agency and the caseworker accept a certain degree of legal responsibility for the child's health safety and well-being. *White v. Rockford*, 592 F.2d 381 (7th Cir. 1979)(allowing a lawsuit

against police officers who upon arresting the minor children's caretaker allegedly left the children without adult protection in an automobile on the side of the road on a cold evening).

The general constitutional principles in this action are clear in cases from Michigan and from many of the federal circuit courts. As noted recently in the Eighth Circuit, ". . . it is not necessary that the Supreme Court has directly addressed the issue . . ." *Norfleet v. Arkansas DHS,* 989 F.2d 289 (8th 1993), citing *Benson v. Allphin,* 786 F.2d 268, 275 (7th Cir. 1986) for a right to be clearly established.

Petitioners' right to be free from harm while in the custody of the state was clearly established by 1987 when they entered foster care. The district court's finding that these children who were taken into custody by the state do not have a clearly established constitutional right to reasonable personal security is clearly erroneous. Its ultimate conclusion that the right did not become clearly established until the *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir. 1990), decision in May, 1990 is erroneous. The right had been clear since the 1982 case law which was developed by the circuits up to and through 1987.

Supreme Court Decisions

It has long been established that individuals in state custody are entitled to protections when they are taken into custody by and are held by the state. The series of Supreme Court cases involving protection of mental patients, pretrial detainees and prison inmates and the situations involving foster care children are virtually identical. *Youngberg v Romeo,* 457 U.S. 307; 315-16 (1982); *Bell v. Wolfish,* 441 U.S. 520, 545 (1979); *Estelle v. Gamble,* 429 U.S. 97, 103-04 (1976).

The United States Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982) has been applied to the foster care setting as it has to other institutionalized settings. *Youngberg* and its progeny require that the state provide individuals who are involuntarily subjected to the state's custody with such services as are necessary to insure their reasonable safety from themselves and others. Similarly, in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Supreme Court held that states are required to provide adequate medical care to incarcerated prisoners. Like the children in this case, the individual is unable to seek alternative living arrangements. Numerous circuit courts have extended those rulings to protect foster care children. *See, in particular, Norfleet v. Arkansas DHS,* 989 F.2d 289 (8th Cir. 1993).

The relationship between foster children and the Cass County Department of Social services and its care providers charged with administering the foster care program involves substantial rights and obligations. *See Norfleet v. Arkansas DHS,* 989 F.2d 289 (8th Cir. 1993), *Walker ex rel. Taylor v. Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987). The Supreme Court in *Ingraham v. Wright*, 430 U.S. 651 (1977) recognized a "substantive right to be free from bodily abuse" that can be remedied through 42 USC §1983.

The Supreme Court made *custody* the test of due process liability for a state's failure to protect a citizen from violence in *DeShaney v. Winnebago County DSS,* 109 S. Ct. 998 (1989). *DeShaney* acknowledged that the Court's decisions since 1976 have recognized a limited exception to the general rule that the constitution generally does not affirmatively oblige the state to provide services or aid to individuals: *"When the state takes a person into its custody and holds him there against his will, the constitution imposes a corresponding duty to*

his will, the constitution imposes a corresponding duty to assume some responsibility for his safety and general well being." *DeShaney*, 109 S. Ct. at 1005. (emphasis added).

Based on these cases which were later reaffirmed by the decision in *DeShaney*, it was clearly established at the time these children entered foster care in 1987 that an affirmative constitutional responsibility for safety and well being arose when they were taken into custody and held there against their will. It is only because the state first acted to restrain the minor Petitioners' liberty and thus took away their ability to care for themselves that any failure to provide reasonable safety transgresses substantive limits on state action in the constitution. *Id.* at 1005-06. The *DeShaney* Court specifically held that the affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him or her, but from the limitation which the state has imposed on his or her freedom to act on his or her own behalf. The state's restraint of an individual's freedom to act on his or her own behalf "through incarceration, institutionalization, or other similar restraint of personal liberty... is the 'deprivation of liberty' triggering the protections of the due process clause." *Id* at 1006.

The right claimed by these minors, as foster children, is a basic interest in safety of the kind accepted in *Youngberg* and does not raise any unsettled questions about any right to treatment and services beyond that minimal level. These foster children are not complaining about the procedures that placed them in state custody or kept them there. They are asserting a substantive violation of a liberty interest explicitly recognized in *Youngberg* and its progeny because custody consists of a larger set of legal rights and responsibilities with respect to the child.

Michigan and Other Courts Decisions

In a Michigan District Court case, *Stonecipher v. Onsted Community Schools et al.,* (ED MI No. 88-74415) the Federal District Court for the Eastern District of Michigan held that the Fourteenth Amendment protects individuals from unjustified intrusions on their personal security by the state, relying on *Youngberg* and *Ingraham.*

The *Stonecipher* Court stated:

> The Fourteenth Amendment has been construed to protect citizens from unjustified intrusions on their personal security by the state. *Youngberg v Romeo,* 457 US 307, 315-316 (1982). Numerous cases have held that students in particular have a due process right to be free from abuse in school. *Ingraham v Wright*, 430 US 651, 673 (1976); *Stoneking v Bradford Area School District,* 856 F.2d 594, 599 (3rd Cir. 1988), *vacated and remanded* 103 L.Ed. 804 (1989), *on remand* 882 F.2d 720 (3rd Cir. 1989); *Garcia v. Miera,* 817 F.2d 650, 656-658 (10th Cir. 1987), *cert denied* ____ US ____, 99 L.Ed.2d 421 (1988).

In another school case, *Stoneking v. Bradford Area School District*, 856 F.2d 594, 599 (3rd Cir. 1988), *vacated and remanded* 103 L.Ed. 804 (1989), *on remand* 882 F.2d 720 (3rd Cir. 1989) a student brought a §1983 action brought against school officials for sexual abuse and harassment by a band director which withstood the Defendant's motion for summary disposition. There, the court relied on *Ingraham v. Wright*, 430 U.S. 651 (1977). See also *Broward County School Board v. Ruiz*, 493 So.2d 474 (Fla. Dist. Ct. App. 1986).

The foster care context is even more analogous than the school setting. They are forced there by the state's

orders. In a real sense, they are institutionalized or similarly retained so that they cannot freely act on their own behalf.

The Eighth Circuit's *Norfleet* decision adopts Petitioners' *Youngberg* arguments presented to this Court. Importantly, the Eighth Circuit carefully analyzes the realities of the relationship between the child and the state when children are placed in foster care. Respondents' placement of these children in a foster home triggers an attendant responsibility to ensure that the child's environment remains safe. *Doe v. New York City Dept of Social Services.*, 649 F.2d 134, 141 (2d Cir. 1981).

In *Doe v. New York City Dept. of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert.denied* 464 U.S. 864 (1983), the Second Circuit held a foster care placement agency was liable under 42 USC §1983 to a foster child who was physically and sexually abused for six years by the foster father.

Likewise, in *Walker ex rel Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1337 (1989) the Eleventh Circuit held that foster children have a constitutionally protected liberty interest in their safety. In *Taylor*, the court held that the state's action in assuming responsibility of keeping the foster child in a safe environment placed an obligation on the state to ensure the continuing safety of that environment. As in *Taylor* and *Doe,* these minor Plaintiffs were severely abused as a proximate result of the state's failure to meet its obligation and ensure these constitutional rights.

The *Taylor* court concluded that, when the state involuntarily places a child in the custodial environment of foster care so that the child is unable to seek alternative living arrangements, the state assumes a

constitutional duty to insure the safety of that environment. *Id.*,818 F.2d at 795. "The state's failure to meet that obligation as evidenced by the child's injuries," in the absence of overriding societal interests constituted a deprivation of liberty and a violation of the foster child's substantive due process rights. *Id* 818 F.2d at 795, 797.

In *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990), the Seventh Circuit ruled that a foster child's substantive due process right to personal safety was clearly established by **1986** (emphasis added), noting that, in 1982 in *Youngberg*, the Supreme Court had ruled that children in state mental institutions had a constitutional right to reasonably safe conditions of confinement. In the present case, as in *Morgan*, social services personnel were responsible for monitoring these minor Petitioners' placement within the foster care system. *Morgan* recognized that the minor child's liberty interests in her physical, emotional, and psychological well-being were protected by the Constitution. The Seventh Circuit was explicit in holding that when a state agency removes children from the custody of their parents, its employees are not entitled to qualified immunity from liability when they place the children with foster parents who have a recognized propensity to neglect or abuse children. *Id.*, 914 F.2d at 854.

As a result of statutory and constitutional requirements, agencies have an affirmative obligation to supervise foster care placements and to remove children from unsuitable or dangerous environments. See *Gill v. Smith*, 382 N.Y.S.2d 626 (Sup. Ct. 1976); *In the Matter of Adoption of Doe*, 444 P.2d 800 (Wash. 1968). Agencies and workers are liable when their negligence results in the abuse or neglect of children while in foster care. *See Doe v. New York City Dept of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981); *Brooks v. Richardson*, 478 F.

Supp. 793 (S.D.N.Y. 1979); *National Bank of South Dakota v. Lier*, 9 Fam. L. Rep. (BNA) 2105 (S.D. Sup. Ct. 1982); *Bradford v. Davis*, 629 P.2d 1376 (Or. 1981); *Andrews v. County of Otsego*, 446 N.Y.S 2d 169 (Sup. Ct. 1982)

Here, one of the foster family's sons, while a member of the household, had been convicted in 1984 of criminal sexual contact of a five-year-old foster care girl, which contact took place while Mr. Krause was present. Neither the foster parents nor their younger son Dale (the perpetrator in this case) participated in counseling. Dale was not examined or evaluated by professionals to determine whether or not he also been had sexually abused by his brother. This is glaring evidence of gross indifference given the serious nature of Robert's problems as noted at his sentencing hearing. [R. 84:Exhibit No.1.]

While in foster care, these children suffered repeated, unspeakable physical and sexual assaults. Respondents knew or should have known these atrocities were being committed. Respondents ignored the past record of the foster home and Respondents ignored the warning signs and pleas for help from these children. *See Vonner v. State*, 273 So.2d 252 (La. 1973), which held that state agency owed enforceable nondelegable duty to a five year old placed with a foster parent who killed him.

In *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988) the Court held that *Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553 (1980), recognized constitutional right to protection on the part of persons in the custody of the state. Id. 838 F.2d at 122. *Massinga's* defendants claimed, as do the Defendants here, that "the law is uncertain as to whether they could reasonably be expected to know that placing children in their custody in an unsuitable foster home could constitute violation of the constitutional right of those children." *Id.*, 838 F.2d

at 122. The Fourth Circuit concurred with the district court in rejecting this position, stating:

> (a) during the period in litigation, there existed a constitutional right to protection on the part of those in the custody of the state or having a special relationship with the state, even out of the prison context, so that Defendants could have reasonably expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them could constitute a violation of Plaintiffs' Fourteenth Amendment rights, and (b) since 1961 Plaintiffs had a statutory right, enforceable under 42 USC §1983, to the care and protection that they allege they were denied, so Defendants could not be said to exercise discretion in an area in which the law respecting their duties and obligations was uncertain. *Id.*, 838 F.2d at 122.

Sixth Circuit Opinions.

In *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir. 1990). The Sixth Circuit held, "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." In rendering this holding, the *Meador* panel relied upon *Taylor* and *Doe.* The *Meador* court further held that the state statutory responsibilities for the operation of state facilities for the care of children created an entitlement to protective services which could "not be deprived without due process of the law." Although *Meador* did not address immunity questions, its analysis evaluated and held that a constitutionally protected right existed for children in foster care homes. The lower court, in its opinion denying Petitioners' motion for reconsideration, acknowledged the applicability of *Meador* to this case. However, it held that

the *Meador* decision changed the direction of the Sixth Circuit and that *Meador* provided relief for the minors only from June 1990 to their removal in November 1990. The Sixth Circuit agreed.

The analysis of the *Norfleet* decision, *Meador* and the other circuit decisions noted herein teach that, based on *Youngberg* and subsequent cases, these children have long had a clearly established right to be kept safe while in the state's custody. These cases involve 1987 or pre-1987 placements, the year these minor Petitioners entered foster care, thus supporting the clearly established constitutional protections.

Respondents relied on *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989), as providing them with immunity protections. However, *Eugene* is distinguishable and the lower courts' reliance on *Eugene* is misplaced. It is not necessary for a fact specific case to be first determined by the United States Supreme Court for the right to be clearly established. The lower court's holding would so require and this is clearly erroneous.

The court in *Eugene* held that the right to protection from bodily harm by a state actor in the foster care setting was not clearly established from 1974 to 1981, the time which the minor child in that case was in foster care. It did recognize, however, that *Doe v. New York City Dept. of Social Services, supra*, which was decided in 1981 "constitutionally imposed obligations from that time forward." *Id.* 889 F.2d at 708. There was not merely a "single circuit court and a single district court" decision prior to the incidents alleged in the complaint before this court. *Id.* A plethora of cases already set forth recognize constitutional protections within the foster care system and as individuals held within the state's control. *Eugene's* complete disregard for the *Youngberg* and *Estelle* line of cases, even after recognizing that *Youngberg*

"leaves no doubt that the substantive component of the Fourteenth Amendment's due process clause imposes certain obligations upon the state with respect to mental patients" is illogical. *Eugene,* 889 F.2d at 710. The line of cases which support constitutional protections for individuals held by the state and within the state's control provides authority that the rights of these minor Plaintiffs were clearly established when they were placed in foster care in 1987.

Thus, Respondents cannot remove themselves from responsibility for their conduct by claims that no clearly established statutory or constitutional rights existed to protect these children.

B.

The Sixth Circuit Court of Appeals Erred in Concluding that a Social Worker Was Not Deliberately Indifferent to the Needs of the Children where she (1) Failed to Immediately Remove the Children from the Foster Home after Sexual Abuse Was Reported and Evidence of Repeated Sexual Abuse and Physical Threats Were Available to Her; (2) Failed to Report the Allegations to Law Enforcement Authorities when Required by State Law to Do So; and (3) Failed to Institute Safeguards to Insure the Children's Safety.

This case involves the repeated sexual abuse of three minor children while in foster care between 1987 and November of 1990. The lower court erred in concluding Respondents were not deliberately indifferent. This issue must be submitted to the jury in light of the factual background of this case. The Court states that compliance with new decisions involves a rule of reason

and that "the question is one of fairness in light of all the facts."

Petitioners urged reconsideration on this crucial point and were denied. Respondents' response to the plight of these children was deliberately indifferent when all of the facts are taken into account and Petitioners are given their justifiable inferences from the facts. Defendant-Appellees' response to the allegations of sexual abuse must be judged in light of all of the circumstances, not only those explanations offered to justify Defendant-Appellee social worker's actions and the broad strokes given by the lower court. Petitioners urge that the following facts and permissible inferences present a jury question on this issue:

1. The children were repeatedly sexually abused, physically threatened and damaged over a long period of time (between 1987 until at least the disclosure on October 8, 1990.) [R.36]

2. Respondents were intimately involved in the process of evaluating the foster family and had numerous documented contacts and access to the licensing file.

3. When Respondents were told of the sexual abuse by one of the children, the children were continued in this foster home for at least another 30 days, knowing this would keep the children in a psychological war zone. The children were alone, confused and afraid because they had previously been threatened with a gun, a knife and brass knuckles. [R.82: Exh. No. 8]

4. It is not and should not be necessary for the perpetrator to "be caught" in the act of abuse,

especially where small children are involved before immediate removal.

5. The sexual abuse described by Keithie, the youngest of the children, to Defendant-Appellee was, even without taking into account the prior conviction of sexual assault by another sibling on a foster child, a major warning sign which demanded immediate attention.

6. The lower courts wrongly concluded that Defendant-Appellee Skipski began an "immediate investigation" after the October 8, 1990 allegation of sexual abuse. What occurred was a concerted effort at downplaying a serious claim in order to cover it up. The inferences to be gleaned from the entire circumstances support Petitioners' claim of deliberate indifference because:

   A. The actions of Respondents after the report of the abuse occurred do not have the ring of investigation; they have the ring of "cover-up". That is the inference to which Petitioners are entitled because the official documents, including case updates to the Court, do not disclose any investigation or proof that one was pursued. [R. 70, Exh. 6] The official documents are disturbingly void of any reference to the alleged abuse. It was only after discovery of Defendant Skipski's notes in this lawsuit that Petitioners were able to demonstrate that Skipski had even written it down. She knew that she was required by statute to report the alleged

physical and sexual abuse, and she did not. [R. 82] She knew she was supposed to call the police and she did not. [R. 82, Exh. 4 at 68 and Exh. 9 at 36] She never called Protective Services [R. 82, Exh. 4 at 66] and she waited 11 days before she ever told the prosecuting attorney [R. 82, Exh. 9 at 25-6, 41], after which she still pressed for termination of parental rights against the advice of the prosecutor. [R. 82, Exh. 9 at p. 33]

B. After October 8, 1990, no effort was made to place the children with the natural parents even though this was the most viable option and was in the end what occurred.

C. Defendant-Appellee Skipski's actions contrast sharply with the actions she took initially when the children were removed from Petitioners' home for "poor housekeeping". In that instance, the children were immediately moved, and no advance warning was given to Mrs. Lintz. A simple note on the door advising that the children had been taken was all that was given.

D. The courts incorrectly concluded "Skipski and the Krauses set up safeguards for the children's protection". [Opinion at p.5] Foster Mother Krause and Dale Krause specifically denied that they were given safeguard instructions. [R.82: Exh. No. 5: S.

Krause Dep. at 70, 75; R.82: Exhibit No. 6: D. Krause Dep. at 117]

E. No one ensured the children would be protected. The clear message given to the children was that their complaints would go unheeded, and they had no refuge. This is particularly true since the children were immediately set down by an angry foster father and challenged and intimidated. The Court's depiction of this event as the "discussion being renewed at home with Mr. Krause present" is a far cry from the reality of that meeting. [R.82: Exh. Nos. 10 and 6] Given the long history of abuse which must be taken as true, this response can only be described as openly hostile to the children's safety. At the very least, this is a factual determination which the jury should make.

F. The children were required to return to what can only be described as a psychological war zone. Sending them back to this setting is, when all the facts are taken into account, deliberately indifferent to their needs and their safety.

C.

The Sixth Circuit Court of Appeals Erred in Concluding the District Court Properly Applied Standards Required for Summary Judgment Where It Made Factual Determinations and Failed to Allow Petitioners Every Reasonable Inference from the Factual Allegations.

In a motion for summary judgment, the non-moving party is entitled to have the Court view the evidence and the inferences therefrom in a light most favorable to him. *Anderson v. Liberty Lobby, Inc.*, 91 L.Ed.2d 202, 216 (1986)("[T]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.") The lower court failed to allow Petitioners the justifiable inferences to which they are entitled. The district court failed to properly apply the standards for summary judgment by reaching conclusions of facts while ignoring facts alleged and supported by Petitioners. Courts must construe the evidence and all inferences to de drawn from it in a light most favorable to the nonmoving party. *Blakeman v. Mead Containers,* 779 F.2d 1146, 1150 (6th Cir. 1985)

CONCLUSION

The District Court and the Sixth Circuit are essentially setting forth a standard which would require the alleged perpetrator be caught before a child (or children) suffering (alleged) abuse is given safe haven. Particularly disturbing in this case which the Court did not address was the Defendant-Appellee Skipski's failure to follow state reporting guidelines and failure to call law enforcement officials after the county prosecutor directed her to do so.

The children were frightened to tell anyone for fear of their lives. When that system failed them, it was Defendant-Appellee who had the power and the duty to protect them. While Skipski may say safeguards were instituted, her position cannot be accepted by the Court where the Foster mother and the alleged abuser both testified that no safeguards or other instructions were given after the allegations arose. This is only one of many significant factual issues which should be determined by a jury.

Given Defendant-Appellee's conduct following the allegations, and the serious factual issues which belong to the jury, this case is appropriate for remand to the lower court for a trial on the merits.

RELIEF REQUESTED

Petitioners respectfully request that this Court grant their request for certiorari and reverse the ruling of the Sixth Circuit Court of Appeals in this matter. Petitioners respectfully requests that this Court remand this case to the U.S. District Court for trial on the merits.

Respectfully Submitted,

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DATED: September 13, 1994

APPENDIX

Case No. 93-1430

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

ORDER

SHERRY LINTZ; KEITH LINTZ, SR; BRIAN ALLEN JACOBS minor, by next friend Sherry Lintz; KEITH JAMES LINTZ, JR., minor, by next friend Sherry Lintz; RICHELE NICOLE JACOBS, minor, by next friend Sherry Lintz,

Plaintiffs-Appellants

v.

LINDA J. SKIPSKI, individually and in her official capacity, jointly and severally; et al,

Defendants-Appellees

KENDALL KRAUSE, individually and in his official capacity, jointly and severally; et al,

Defendants

BEFORE: **JUDGES MERRITT, MILBURN AND SILER**

Upon consideration of the petition for rehearing filed by the appellants,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0189P (6th Cir.)
File Name: 94a0189p.06

No. 93-1430

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERRY LINTZ; KEITH LINTZ, SR.; RICHELE NICOLE JACOBS; BRIAN ALLEN JACOBS; and KEITH LINTZ, JR., by next friend Sherry Lintz,
Plaintiffs-Appellants,

v.

LINDA K. SKIPSKI,
Defendant-Appellee.

} ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed May 25, 1994*

Before: MERRITT, Chief Judge; and MILBURN and SILER, Circuit Judges.

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*This decision was originally issued as an "unpublished decision" filed on May 25, 1994.

MERRITT, Chief Judge. In this § 1983 action, the plaintiffs allege abuse of children in a state-licensed foster care home and appeal the district court's order granting summary judgment to the defendant based on qualified immunity. The defendant, Linda Skipski, a social worker for the Cass County Department of Social Services, placed the plaintiffs, then ages 2, 4 and 5, in a foster home run by Kendall and Shirley Krause. The Krause's adopted son, Dale, age 15, allegedly abused the children sexually between May 1987 and November 1990. Plaintiffs contend that defendant failed to conduct a proper investigation which would have uncovered the sexual abuse and that she did not adequately protect the children after the abuse came to light. The district court found defendant entitled to qualified immunity because the children's federal constitutional due process right to be free from unnecessary harm in foster homes was not clearly established until late in the period of harm alleged in the complaint and that thereafter none of defendant's acts violated plaintiffs' rights. The questions before us are: when did the substantive right found by the district court become clearly established; and, after that point, did defendant's conduct violate that right.

In the 1980's, other circuits ruled that foster children in state-licensed homes have a due process right to be protected by state officials. *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983). Nevertheless, in 1989 the Sixth Circuit held that social workers were entitled to qualified immunity in the foster care area because it was *not* clear in this circuit that children had a right to such protection. *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989) (Merritt, J., dissenting), *cert. denied*, 496 U.S. 931 (1990). In fact, the Court's application of the qualified immunity doctrine in *Eugene D.* questioned whether foster children had any substantive due process rights and, consequently, whether a federal cause of action based on the Constitution existed.

In May 1990, our Court changed direction and held that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes," *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990), but left undefined the specific standard of conduct required. In addition to *Taylor* and *Doe*, other circuits are also now in accord. *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). These cases analogize the state's role in placing children in foster homes to the mental institution and prison settings in which state liability has been clearly established for "deliberate indifference" to the plight of individuals in detention. *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976).

The district court held that the law became "clearly established" as of May 1990 with the decision in *Meador* but did not discuss the amount of time social workers had to adapt to the decision. We have previously stated that defendants are not usually lawyers and that they do not have "familiarity with the contents of the Federal Reporter." *Davis v. Holly*, 835 F.2d 1175 (6th Cir. 1987). State officials must have some time to adjust to and learn about judge-made law as it evolves, and this is particularly true in the foster care area because *Meador* changed the direction of the law in this circuit. This and other circuits have struggled to decide how long after a decision state officials have to become familiar with "the law," and no rule has emerged. In *Robinson v. Bibb*, 840 F.2d 349, 350 (6th Cir. 1988), a panel of this Court noted the possibility that four days *might* not be enough time for an official to learn about a decision clearly establishing that certain conduct violates a right but under the facts of the case held that two years was more than enough time to satisfy the "clearly established" threshold. *Id.* at 350-51. *See also Arebaugh v. Dalton*, 730 F.2d 970, 973 (4th Cir. 1984) (twelve days after Supreme Court decision may be enough time to have "read and digested the . . . holding"); *Garcia v. Miera*, 817 F.2d 650, 657 n.10 (10th Cir. 1987), *cert.*

denied, 485 U.S. 959 (1988) (five months sufficient time to be aware of Tenth Circuit decision); *Schiff v. Williams*, 519 F.2d 257, 263 (5th Cir. 1975) (Gee, J., specially concurring) (arguing that law was sufficiently established by Fifth Circuit opinion that had been decided two months prior to defendant's actions). *But see Affiliated Capital Corp. v. Houston*, 735 F.2d 1555, 1569-70 (5th Cir. 1984) (en banc), *cert. denied*, 474 U.S. 1053 (1986) (granting qualified immunity notwithstanding Fifth Circuit case decided five months prior to defendant's unlawful action); *Schlothauer v. Robinson*, 757 F.2d 196, 197-98 (8th Cir. 1985) (qualified immunity granted despite on point decision decided eleven days prior to defendant's actions).

A court should apply a rule of reason in each case with respect to compliance with new decisions. As with other similar timing problems - for example in equitable tolling and laches cases - the question is one of fairness in light of all the facts. Here, four months seems sufficient for social workers to have learned of the decision and to have adjusted their conduct accordingly. But we agree with the district court that the defendant's actions after May 1990 were not sufficiently unreasonable to constitute "deliberate indifference" to the children - the prevailing standard now being applied in such cases. *Norfleet*, 989 F.2d at 291; *Meador*, 902 F.2d at 476.

The district court's finding that qualified immunity bars liability for conduct prior to May 1990 does not mean defendant's knowledge of prior events is irrelevant on the question of deliberate indifference after the substantive right was established. What the defendant knew prior to the establishment of the right is part of the context in which a duty to act thereafter should be judged.

The Lintzes assert that signs of sexual abuse began to appear in the children before October 1990. From 1988 to 1990, Shirley Krause reported on several occasions that the children were "acting out" sexually by allegedly touching themselves and each other. The family was seeing a therapist whose notes say that in September 1988 the

children told Mrs. Krause that Dale was hurting them, although nothing indicated that this included any sexual misconduct. In March 1990, one of the boys was disciplined at school for kissing and touching a girl, and a note from the teacher stated that he did not understand that his conduct was inappropriate. All of these incidents were discussed with the therapist who in turn reported them to Skipski. Plaintiffs argue that the defendant should have seen these as signs that the children were being sexually abused.

Plaintiffs also allege that defendant knew or should have known about previous sexual misconduct involving the Krauses' older son Robert, who pleaded guilty in 1984 to sexually assaulting a five year old girl. Robert did not live at the home while plaintiffs resided there and he is not involved in any of the allegations of abuse in this case. Nonetheless, because of this prior problem, plaintiffs allege that Skipski should have been on notice about possible abuse in the Krause home and thus that she failed to investigate properly the children's behavior.

On October 2, 1990, Mrs. Krause overheard two of the children in bed talking about pulling each other's pants down, which she reported. On October 8, 1990, the first specific allegation of sexual abuse was made. One of the children told a therapist that he had oral sex with Dale Krause after Dale promised to give him two dollars and to let him play Nintendo. In response to this allegation, Skipski began an immediate investigation. She and the therapist met with the children and Mrs. Krause to discuss the incident. The discussion was renewed at home with Mr. Krause present. Skipski and the Krauses set up safeguards for the children's protection. They ensured that the children would be fully supervised so that no further abuse would occur while Skipski located another home which could accommodate all three siblings. As the district court noted, "Skipski searched for a place to send the children . . . [she] discussed emergency placement with the attorney for Mrs. Lintz and the guardian-ad-litem for the children, both of whom apparently opposed moving the

children immediately." *Lintz v. Skipski*, 815 F.Supp. 1066, 1069 (W.D.Mich. 1993). There is no allegation of abuse during the month plaintiffs remained in the home before being relocated.

Plaintiffs maintain Skipski should have immediately removed the children from the home on October 8, 1990. Looking at all of the facts, we agree with the district court that defendant did not respond after May 1990 with deliberate indifference. As of October 8th, Skipski had only an accusation to rely on: Dale was not caught abusing the children. Indeed, when confronted, Dale denied the charges. Skipski investigated while she attempted to find a new home where all three children could stay together. Safeguards were instituted to insure the children's safety and within a month the children were removed from the Krause home. The whole affair might have been better handled from the beginning, but that is not the issue. There must be "deliberate indifference," and there was none after the substantive due process right became clearly established. This is the crucial point.

Accordingly the judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRY LINTZ, KEITH LINTZ, SR., and RICHELE NICOLE JACOBS, BRIAN ALLEN JACOBS and KEITH JAMES LINTZ JR., by next Friend, SHERRY LINTZ,

Plaintiffs,

-vs-

FILE NO. 1:92 CV 83
Hon. Gordon J. Quist

LINDA J. SKIPSKI, KENDALL KRAUSE, SHIRLEY KRAUSE, DALE KRAUSE, individually and in their official capacities, and CASS COUNTY DEPARTMENT OF SOCIAL SERVICES, MITCH WALKER, individually and in his official capacity as Cass County Probate Court Foster Care Licensing Agent, ROBIN ZOLLAR SMIETANKA, individually and d/b/a Assault Recovery Associates and OTHER UNNAMED CO-CONSPIRATORS, jointly and severally, and for injunctive relief,

Defendants.

OPINION

Plaintiffs brought this action under Title 42 USC §1983 claiming they were deprived of constitutional rights. They have also alleged several pendent state law claims. Defendants LInda Skipski, Kendall Krause, Shirley Krause Dale Krause and Cass County Department of

Social Services have filed motions to dismiss and motions for summary judgment claiming a variety of defenses and immunities.

FACTS

Plaintiff Sherry Lintz is the natural parent of the minor plaintiffs, Richele Jacobs, Brian Jacobs and Keith LIntz, Jr. Plaintiff Keith Lintz, Sr. is the nature father of Keith Lintz, Jr. On May 22, 1987, the Cass County Probate Court made the minor plaintiffs temporary wards of the court pursuant to a neglect petition brought by the Michigan Department of Social Services.[1] By court order, the children were placed in the home of defendants Kendall and Shirley Krause. Mr. and Mrs. Krause were licensed foster care parents pursuant to M.C.L. 722.111-118; M.S.A. 25.358(11)-(18). The children remained with the Krauses until approximately November 6, 1990, when they were placed in another foster home. The children were returned to the home of their natural parents on December 7, 1990.

Plaintiffs have alleged that during the children's stay in the Krause home, numerous atrocities occurred. They cite the following incidents. On June 16, 1988, Shirley Krause advised Robin Smietanka, a certified social worker, that Brian and Keith were acting out in a sexual manner. Brian was touching Keith's genitals. On September 12, 1988, Ms. Smietanka was advised that the minor plaintiffs were complaining of being hurt by Dale Krause, the minor son of Dale and Shirley Krause. On July 17, 1990, Ms. Smietanka noted in her files that Shirley Krause had heard Keith saying "stop" after Brian had crawled into bed with him. On October 2, 1990, Mrs.

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[1]Plaintiff Sherry Lintz subsequently pled responsibility to the neglect petition.

Krause reported that she overheard Brian say to Keith "you take my pants down and I'll take your pants down." Plaintiffs contend that because no investigation was initiated to ascertain the reason for the inappropriate sexual behavior exhibited by these children the defendants were conspiring to cover up these incidents.

Finally, in approximately October of 1990, the children were allegedly sexually and physically abused by defendant Dale Krause. Dale Krause is the adopted son on Mr. and Mrs. Krause. He was placed with Mr. and Mrs. Krause as a foster child when he was two weeks old and legally adopted by them at the age of two. In October of 1990, Keith, on of the minor plaintiffs, accused Dale Krause of inappropriate sexual contact. Keith allegedly told Ms. Smietanka that he had sucked Dale's penis after Dale promised him $2.00 and an opportunity to play Nintendo. The children were questioned about the incident by Mrs. Krause and Linda Skipski, a Department of Social Services worker. After this alleged incident, Mrs. Krause allegedly requested that the children be removed from the Krause home immediately. However, defendants Linda Skipski and Robin Smietanka told Mrs. Krause to keep the children. Based upon this recommendation the Krauses kept the children. As a result of the accusations against Dale Krause, Mrs. Krause allegedly took steps to ensure that the children were never in unsupervised contact with Dale Krause. Approximately a month later on November 6, 1990, the children were removed from the Krause home.

The plaintiffs' First Amended Complaint contains nine counts. Counts I, II and III allege federal claims pursuant to 42 USC §1983 for deprivation of constitutional rights. Specifically, Count I alleges violation of Fourteenth Amendment substantive due process rights; County II alleges violation of Fourteenth

Amendment procedural due process rights; and Count III alleges §1983 conspiracy and coverup.[2]

Defendants Cass County Department of Social Services, LInda Skipski and Kendall, Shirley and Dale Krause have filed motions for summary judgment and/or motions to dismiss.

Summary Judgment Standard

Summary judgment is appropriate if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the nonmoving party. *Id.* This standard requires the nonmoving party to present more than a scintilla of evidence to defeat the motion. The summary judgment standard mirrors the standard for a directed verdict. The only difference between the two is procedural. Summary judgment is made based on documentary evidence before trial, and directed verdict is made based on evidence submitted at trial. 477 U.S. at 250-51, 106 S.Ct. at 2511. A moving party who does not have the burden of proof at trial may properly support a

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[2]Counts IV through IX allege intentional infliction of emotional distress and mental anguish, liability for failure to supervise, negligence,e assault and battery, professional negligence and declaratory and injunctive relief.

motion for summary judgment by showing the court that there is no evidence to support the nonmoving party's case. *Celetex Corp. v. Catrett,* 477 U.S. 317, 324-25, 106 S.Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate that there is a genuine issue of material fact for trial. *Id.* The Court must draw all inferences in a light most favorable to the non-moving party, but the Court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Financial Corp. v. Van Sickle,* 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

Cass County Department of Social Services

Defendant Cass County Department of Social Services (Cass County DSS) contends that plaintiffs' claims against it are barred by the Eleventh Amendment. The Eleventh Amendment to the United States Constitution restricts the power of federal courts to hear claims against states. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

Although the Eleventh Amendment, itself, does not bar a suit by a citizen of a state against the citizen's ;own state, the Supreme Court in *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504 (1890) extended the Eleventh Amendment by holding that citizens could not sue their own state in

federal court. Therefore, the State of Michigan and its agencies are immune from liability for damages or injunctive relief in federal court pursuant to the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900,908 (1984) ("a suit in which the State or one of its agencies or departments, is named as the defendant is proscribed by the Eleventh Amendment").

Although a state's Eleventh Amendment immunity can be waived, the Supreme Court has held that Congress, in enacting §1983, did not intend to abolish a state's Eleventh Amendment immunity. *Will v. Michigan Dept. of State Police,* 491 U.S. 48, 109 S.Ct. 2304 (1989). In *Will,* the court stated that §1983 does not provide a federal forum for litigants seeking a remedy against a state for alleged deprivations of civil liberties.

Thus, this Court must consider whether the Cass County DSS is a state agency which is immune from liability under the Eleventh Amendment.[3] County DSS offices have repeatedly been found to be instrumentalities of the state. In *Emerson v. State of Michigan,* No. G88-562 CA (WD Mich. January 10, 1989), Judge Gibson found that the Grand Traverse County Department of Social Services and the Wexford County Department of Social SErvices were agents of the state for purposes of the Eleventh Amendment and therefore were entitled to dismissal on Eleventh Amendment grounds. Similarly, in *Monk v. Minzey,* No. K85-46 CA (WD Mich. December

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[3]The state department of social services is responsible for the administration of child care organizations including foster homes. MCL 722.111; MSA 25.249(11). Any judgment against the Cass County Department of Social Services would be paid from the state treasury. MCL 18.1459; MSA 3.516(459)

26, 1985), this Court held that the Berrien County Department of Social Services was an agency of state government subject to dismissal pursuant to the Eleventh Amendment. *See also* O.,A.G. 1967-1968, No. 4607, p. 174 (February 6, 1968) and O.A.G. 1975-1976, No. 4973, p. 400 (April 16, 1976). Plaintiffs have conceded in their Amended Complaint that the "Cass County Department of Social Services is a public agency created and operated by the State of Michigan."

This Court finds that the Cass County Department of Social Services is a state agency, and, therefore pursuant to the Eleventh Amendment, it cannot be sued in federal court. Consequently, the Cass County Department of Social Services' Motion to Dismiss is granted.[4]

Linda Skipski

Plaintiffs have sued defendant Skipski in her individual capacity for monetary damages.[5] They allege that Ms. Skipski's failure to protect the minor children

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[4]The Cass County Department of Social Services also contends that because it is a state agency, it is not a "person" within the meaning of §1983 and Counts I, II, and III should be dismissed. *See Will v. Michigan Dept. of State Police*, 491 U.S. 48, 109 S.Ct. 2304 (1989). However, because the Court has already determined that the plaintiffs' entire action against the Department of Social Services should be dismissed on Eleventh Amendment grounds, it will not address this issue.

[5]Because the Eleventh Amendment prevents this Court from entertaining damage actions against state officials sued in their official capacities, the damage claims against Ms. Skipski insofar as she is being sued in her official capacity must be dismissed.

from abuse while they were placed in a foster care home violated their constitutional rights. Defendant Skipski contends that she is entitled to qualified immunity; and therefore, the plaintiffs' §1983 claims against her are barred.

It is clear that the Eleventh Amendment does not bar plaintiffs from bringing claims for monetary damages against state officials who are sued in their individual capacities. *Foulks v. Ohio Dep't of Rehabilitation & Correction*, 713 F.2d 1229, 1233 (6th Cir. 1983); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974). However, the qualified immunity doctrine shields government officials performing discretionary functions from civil damages liability provided their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).

The doctrine of qualified immunity applies to officials sued in their individual capacities provided:

> [A] reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions.

Poe v. Haydon, 853 F.2d 418, 423-24 (6th Cir. 1988).

Defendant cites *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989) to support her position that qualified immunity protects social workers like herself from liability for injuries sustained by children in a foster care home. In *Karman*, the plaintiff brought a §1983 action against Kentucky social workers claiming he was harmed during his placement in a state licensed foster home as a result

of the social worker's deliberate indifference to his needs. The defendants argued that during the period when plaintiff was in a foster home[6] it was not clearly established that the due process clause of the Fourteenth Amendment imposed upon them a duty to assume responsibility for plaintiff's care.

The Sixth Circuit held that the right to personal safety in a foster home was not a clearly established federal right during the time period form 1974-1982. Consequently, the court refused to impose personal liability on the social workers. It stated:

> In an opinion issued on February 22, 1989, *DeShaney v. Winnegago County Dep't of Social Services,* 109 S.Ct. at 1006 n.9, the Supreme Court made clear that it has not yet addressed whether the placement by the State of a child in a foster home operated by its agents, gives rise to an affirmative duty to protect that child. Likewise, our court has not yet addressed the issue, nor need we do so today. . . .

Id. at 707 (Emphasis added.)

In support of their motion, plaintiffs cite *Meador v. Cabinet for Human Resources,* 902 F.2d 474 (6th Cir. 1990). In *Meador,* the Sixth Circuit specifically refused to address the issue of qualified immunity as it had not been raised in the district court. It did, however, consider whether a child allegedly abused in a foster home could raise a claim under . The court held that due process does not extend to the "right to be free from the infliction

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[6]Plaintiff was placed in a foster home from May of 1974 to December of 1982.

of unnecessary harm to children in state-regulated foster homes." *Id.* at 476

The issue this Court must decide is whether the right of a foster child to be feel from unnecessary harm was sufficiently clear between May 1987 and November 1990 when the minor plaintiffs were placed in foster care so that a "reasonable official would understand that what he was doing violated the law."

In *Meyers v. Cincinnati,* No. 91-4182 (6th Cir. Nov. 12, 1992), the Sixth Circuit considered whether municipal officials who had dismissed a public employee in violation of his First Amendment rights were entitled to qualified immunity. The court determined that at the time of the plaintiff's dismissal the law regarding public employees' First Amendment rights was not "clearly established." Therefore, the requisite "clarity" of the law was lacking and the defendants were entitled to the protection of qualified immunity.

This Court believes that the constitutional right being claimed by the plaintiffs was not clearly established between May of 1987 and November of 1990. Until May of 1990 when the Sixth Circuit decided *Meador*, courts in this circuit had not even addressed whether such a right even existed - much less whether the right was clearly established. The Court does not believe Ms. Skipski violated a clearly established constitutional right. Therefore, her motion will be granted based upon the doctrine of qualified immunity.

Injunctive Relief

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908) permits plaintiffs to seek injunctive relief to restrain state officials sued in their official capacities from engaging in unconstitutional conduct. In their Amended Complaint,

plaintiffs have sought injunctive relief against the Cass County DSS and its officials to prohibit further placement of foster care children in homes where previous sexual and/or physical abuse has occurred. Plaintiffs also seek to enjoin defendants form exercising policies and practices which result in the deprivation of protected statutory and constitutional protections of foster care children.

In *Los Angeles v. Lyons,* 461 U.S. 95, 105, 103 S.Ct. 1660, 1667 (1983), the plaintiff had allegedly been illegally choked by police officers after being stopped for a traffic violation. He brought a claim under §1983 for damages and injunctive relief. The Supreme Court held that the plaintiff had failed to demonstrate a case or controversy which would justify injunctive relief. Although he had standing to assert a claim for damages, he could not establish a real and immediate threat that he would again be illegally choked; and therefore, he was not entitled to injunctive relief,.

The plaintiffs in this case are similarly unable to establish an immediate threat that they will be subject to the unconstitutional conduct of which they complain. The minor plaintiffs in this case are now residing with their natural mother and are not in danger of being threatened with sexual or physical abuse in a foster care home. Therefore, this Court finds that plaintiffs do not have standing to assert a claim for injunctive relief. Plaintiffs' claims for injunctive relief must be dismissed.

Kendall, Shirley and Dale Krause

The Krauses contend that they are not "state actors"nor did they conspire with other defendants to deprive the plaintiffs of their federally protected rights. Therefore, they are not subject to liability under 42 USC §1983.

A plaintiff seeking redress under §1983 must allege deprivation of a right secured by the federal Constitution or laws of the United States by a person acting under color of state law. The primary issue in deciding whether a private party's actions constitute "state action" is whether the party's actions may be "fairly attributable to the State". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753 (1982).

There are no Michigan or Sixth Circuit cases that specifically address the issue of whether foster parents are "state actors" for the purposes of §1983. The Sixth Circuit has, however, considered when the actions of a private party may constitute state action for purposes of §1983. In *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992), the court considered whether the Portage Path Community Mental Health Center (Portage Path) acted under color of state law when it fired the plaintiff, an employee, for alleged improper conduct. Portage Path is a private, non-profit corporation which contracted with the county to provide counseling and mental health services. The contract provided for government funding. It also required portage Path to comply with regulations and submit financial records.

In determining whether Portage Path's decision to terminate the plaintiff could be attributable to the state, the Sixth Circuit applied three tests:

1. The public function test;

2. The state compulsion test; and

3. The symbiotic relationship or nexus test.

The Sixth Circuit concluded that Portage Path did not qualify as a stat actor under any of the applicable tests.

Id. at 1338. The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state. The court found that providing mental health services as not a power traditionally reserved to the state. Therefore, Portage Path did not constitute a state actor under the public function test. *Id.* at 1335.

The court also determined that Portage Path was not a state actor under the state compulsion test. The state compulsion test requires that a state exercise coercive power or provide such significant encouragement that the choice of the private actor is deemed to be that of the state. The court held that although the state provided a significant portion of the funding for Portage Path, it did not choose the members of the board of trustees or make decisions for the facility. Therefore, the state did not exercise coercive power or provide encouragement to make Portage Path's decision to terminate the plaintiff an action of the state. *Id.*

Finally, the court concluded that Portage Path was not a state actor under the symbiotic relationship or nexus test. Under that test, a private party's action constitutes state action if there is a sufficiently close nexus between a state and the challenged action of the regulated entity. The court noted that simply because a business is subject not regulation does not by itself convert its action into that of the state. Based upon this analysis, the Sixth Circuit concluded that Portage Path was not a state actor for purposes of §1983. *Id.*

In this case, the plaintiffs have alleged that M.r and Mrs. Krause were acting under color of state law. However, the Krauses do not qualify as state actors under the public function test. The care of foster children is not a power which has been exclusively reserved to the state. Neither are the Krauses state actors under the state

compulsion test. The state did not exercise coercive power over the Krauses. Day-to-day parenting decisions were left to the judgment of the Krauses. Finally, the Krauses are not state actors under the symbiotic relationship test. In this case, a sufficiently close nexus between the state and the challenged action is lacking. Although the Krauses were required to be licensed, state regulation does not by itself convert a private party's action into that of the state. *Id.* at 1336.

This Court is unaware of any case which has held that foster parents are state actors. Indeed, courts in other jurisdictions have refused to attribute the actions of foster parents to the state. In *Milburn v. Anne Arundel County Dept. of Social Services,* 871 F.2d 474 (4th Cir. 1989), the minor plaintiff Charles Milburn, Jr. was voluntarily placed by his parents in the licensed foster home of Mr. and Mrs. Tucker. While he was in their care, Milburn sustained injuries as a result of abuse by his foster parents. He filed a complaint under 42 USC §1983 alleging that his federal rights had been violated. The plaintiff argued that the Tuckers were state actors because the state produced the foster parents through its licensing procedure and promised to supervise his placement in the foster home. The trial court dismissed the action. On appeal, the Fourth Circuit addressed the issue of whether the Tuckers were state actors:

> . . . for a private party to fall within the scope of §1983 as a state actor, the State must have so far insinuated itself into a position of interdependence with the charged party that it must be recognized as a joint participant in the challenged activity which, on that account, cannot be considered to have been so "purely private." 365 U.S. 1 725, 81 S.Ct. at 862. For the relationship of the State to the Tuckers, the plaintiff depends on only a contract his foster

> parents signed with Anne Arundel County Department of Social Services, an agency home approval of the Tuckers home as a foster home for two children, and the Maryland statutes, Article 27, §35A (1970), as that statute relates to reporting the suspected child abuse to the plaintiff.

871 F.2d 474, 477 (4th Cir. 1989), relying upon *Burton v. Wilmington Parking Authority,* 365 U.S.715, 81 S.Ct. 856 (1961.

The Court considered the following factors:

(1) The contract provided only general guidelines for the foster home;

(2) DSS was responsible for providing board, medical care, clothing and supervision of the child during the placement;

(3) The Tuckers did not receive compensation for the services;

(4) The contract did not provide any specific conduct of the foster parents with respect to the foster child; and

(5) All of the day-to-day parenting decisions were left to the foster parents.

Id. at 477.

Based upon these facts, the court determined that the Tuckers were not state actors. Neither the contract the Tuckers signed with DSS nor the agency's approval form provided for the type of intimate relationship between the state and the Tuckers which would convert the Tuckers' action into that of the state. The state did not

exercise coercive power over the tuckers and was not responsible for the abuse itself. The court stated that the care of foster children is not traditionally the exclusive prerogative of the state. Therefore, the Tuckers' actions should not be attributed to the state.

In *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874 (ED Va. 1991), the plaintiffs brought an action alleging the state had violated their constitutional rights when their minor children were allegedly abused by foster parents. The court held that the foster parents were not state actors since the foster homes were not operated by the DSS. It also stated that the transfer of the childrens' physical custody to foster parents did not make the DSS the"permanent guarantor" of the childrens' safety. *Id.* at 884.

This Court finds that the Krauses are not state actors for purposes of §1983. Their actions cannot be fairly attributable to the state. Therefore, the Krauses motion for summary judgment with regard to Counts I and II will be granted.

Conspiracy

Plaintiffs have alleged in Count III of their Complaint that the Krauses conspired with other defendants to cover up the alleged sexual and physical abuses which took place during the children's placement in the Krause home. They also cite Robert Krause's criminal record as evidence of a conspiracy among the defendants. Plaintiff Robert Krause, the adult son of Mr. and Mrs. Krause, plead guilty to Second Degree Attempted Criminal Sexual Conduct in 1984. Although Robert Krause did not reside in or visit the Krause's home during the children's placement there, plaintiffs believe that because Robert Krause's conviction was not included in the official record

the defendants conspired to cover up this information and deprive plaintiffs of their federally protected rights.

Although a private individual cannot be liable under 42 USC §1983, a conspiracy between a private individual and state officials can result in a §1983 cause of action against a private individual. However, a private person must do more than passively acquiesce to directions given by a state official before he can be found to have shared the common objective of a conspiracy and therefore become liable under §1983. *Taylor v. List,* 880 F.2d 1040 (9th Cir. 1989). To establish a conspiracy it must be shown that a private person "'willfully participate[s] in joint action with state officials to deprive others of constitutional rights.'" *Id.* at 1048 (quoting *United Steelworkers of American v. Phelps Dodge Corp.,* 865 F.2d 1539, 1540 (9th Cir. 1989).

In *Ppontarelli Limousine, Inc. v. Chicago,* 704 F. Supp. 1503 (ND Ill. 1989), the plaintiffs were unable to prove a conspiracy because the private defendants were forced to accept a decision made by the city. The court stated in dicta:

> [I]t seems clear to this court that when a governmental body instructs a private party to choose among a variety of ways of doing business, the fact that the private party acquiesces in one of those ways in order to save its business does not make its agreement to do so a "meeting of the minds" for the purposes of §1983 conspiracy law.
>
> As Judge Posner recently stated, "To be liable as a conspirator you must be a voluntary participant in a common venture.

Pontarelli at 1510

In this case, the record clearly indicates that the Krauses did not expressly or impliedly agree with the other defendants to deprive the plaintiffs of their federally protected rights. Mrs. Krause repeatedly reported to Ms. Smietanka that the minor plaintiffs were exhibiting appropriate behavior. Once Mrs. Krause learned of the allegations against her adopted son, she immediately requested that the children be removed form her home. When the Krauses were instructed by the state to keep the children in their custody, they complied with that instruction. Their passive acquiescence does not rise to the level of a conspiracy. Furthermore, this Court does not believe that Robert Krause's criminal record is material to the plaintiffs' claim of conspiracy. Robert Krause did not abuse the children. Indeed, he did not even reside in the Krause home during the relevant time period.

The plaintiffs' allegations with respect to conspiracy are insufficient to establish liability under §1983. Therefore, the Krauses' motion for summary judgment with respect to Count III of the Complaint will be granted.

Pendent Jurisdiction

Because this Court is dismissing Counts I, II and III of plaintiff's Complaint which allege federal claims, it no longer has jurisdiction over the pendent stat claims. Therefore, Counts IV-IX will be dismissed without prejudice so that plaintiffs may assert these claims in state court.

SUMMARY

For the reasons stated above, this Court grants defendants' motions to dismiss and motions for summary judgment with respect to:

(1) Plaintiffs' claims against the Cass County DSS on the basis of Eleventh Amendment immunity.

(2) Plaintiffs' claims for damages against defendant Linda Skipski in her official capacity on the basis of Eleventh Amendment immunity.

(3) Plaintiffs' claims for damages against defendant Linda Skipski in her individual capacity based upon qualified immunity.

(4) Plaintiffs' claims for injunctive relief for lack of standing.

(5) Plaintiffs' claims against defendants Kendall, Shirley and Dale Krause for failure to state a claim under 42 USC §1983

(6) Plaintiffs' pending state claims are dismissed without prejudice.

An order consistent with this Opinion will be entered.

Dated: November 25, 1992

GORDON J. QUIST
United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRY LINTZ, KEITH LINTZ, SR., and RICHELE NICOLE JACOBS, BRIAN ALLEN JACOBS and KEITH JAMES LINTZ JR., by next Friend, SHERRY LINTZ,

Plaintiffs,

-vs-

FILE NO. 1:92 CV 83
Hon. Gordon J. Quist

LINDA J. SKIPSKI, KENDALL KRAUSE, SHIRLEY KRAUSE, DALE KRAUSE, individually and in their official capacities, and CASS COUNTY DEPARTMENT OF SOCIAL SERVICES, MITCH WALKER, individually and in his official capacity as Cass County Probate Court Foster Care Licensing Agent, ROBIN ZOLLAR SMIETANKA, individually and d/b/a Assault Recovery Associates and OTHER UNNAMED CO-CONSPIRATORS, jointly and severally, and for injunctive relief,

Defendants.

ORDER

In accordance with the Opinion filed this date,

IT IS ORDERED AND ADJUDGED that defendant Cass County Department of Social Services' Motion to

Dismiss the Plaintiffs' Complaint (docket entry #46) is GRANTED.

IT IS FURTHER ORDERED that defendant Linda Skipski's Motion for Summary Judgment with respect to Counts I, II and III (docket entry #46) is GRANTED.

IT IS FURTHER ORDERED that defendants Kendall, Shirley and Dale Krauses' Motion for Summary Judgment with respect to Counts I, II and III (docket entry #42) is GRANTED.

IT IS FURTHER ORDERED that plaintiffs pending state law claims are DISMISSED WITHOUT PREJUDICE.

Dated: November 25, 1992

GORDON J. QUIST
United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRY LINTZ, KEITH LINTZ, SR., and RICHELE NICOLE JACOBS, BRIAN ALLEN JACOBS and KEITH JAMES LINTZ JR., by next Friend, SHERRY LINTZ,

Plaintiffs,

-vs-

FILE NO. 1:92 CV 83
Hon. Gordon J. Quist

LINDA J. SKIPSKI, KENDALL KRAUSE, SHIRLEY KRAUSE, DALE KRAUSE, individually and in their official capacities, and CASS COUNTY DEPARTMENT OF SOCIAL SERVICES, MITCH WALKER, individually and in his official capacity as Cass County Probate Court Foster Care Licensing Agent, ROBIN ZOLLAR SMIETANKA, individually and d/b/a Assault Recovery Associates and OTHER UNNAMED CO-CONSPIRATORS, jointly and severally, and for injunctive relief,

Defendants.

ORDER

In accordance with the Opinion filed this date,

IT IS FURTHER ORDERED that defendant Mitchell Walker's Motion for Summary Judgment (docket entry #91) is GRANTED.

IT IS FURTHER ORDERED THAT plaintiffs' Motion for Reconsideration (docket entry #89) is DENIED.

Dated: February 25, 1993

GORDON J. QUIST
United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRY LINTZ, KEITH LINTZ, SR., and RICHELE NICOLE JACOBS, BRIAN ALLEN JACOBS and KEITH JAMES LINTZ JR., by next Friend, SHERRY LINTZ,

Plaintiffs,

-vs-

FILE NO. 1:92 CV 83
Hon. Gordon J. Quist

LINDA J. SKIPSKI, KENDALL KRAUSE, SHIRLEY KRAUSE, DALE KRAUSE, individually and in their official capacities, and CASS COUNTY DEPARTMENT OF SOCIAL SERVICES, MITCH WALKER, individually and in his official capacity as Cass County Probate Court Foster Care Licensing Agent, ROBIN ZOLLAR SMIETANKA, individually and d/b/a Assault Recovery Associates and OTHER UNNAMED CO-CONSPIRATORS, jointly and severally, and for injunctive relief,

Defendants.

OPINION ON PLAINTIFFS' MOTION FOR RECONSIDERATION AND DEFENDANT MITCHELL WALKER'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, parents and three children, brought this Section 1983 action, claiming that the children had been deprived of their constitutional rights while in foster care by being made subject to sexual, physical and emotional

abuse. Defendants included Linda Skipski, a Cass County social worker ("Skipski"), Kendall and Skipski, the foster parents and Dale Krause, their son, (collectively the "Krauses") and the Cass County Department of Social Services (the "County"). Defendants Skipski, the Krauses, and the County moved for dismissal or summary judgment. Their motions were granted in an Opinion and Order filed November 25, 1992.

Plaintiffs have now moved for reconsideration of portions of the Opinion and Order. They argue that the Defendants were not entitled to qualified immunity because Plaintiffs' rights were clearly established at the time of the alleged violations and also ask for reconsideration of their conspiracy claim. This Court has reconsidered and reaffirms its Opinion. Its holding on qualified immunity, however, merits further explanation.

Qualified Immunity

The qualified immunity doctrine shields government officials performing discretionary functions from civil damages liability, provided their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 US 800, 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982.

As the Sixth Circuit recently explained in *Meyers v City of Cincinnati*, 979 F2d 1154 (6th Cir. 1992) the doctrine of qualified immunity is based on the policy that the public is better served if officials are free to act with independence and without fear of consequences when their duties require action in areas where clearly established rights are not implicated. *Id.* at 1156, citing *Harlow v. Fitzgerald*, 457 US at 819, 102 S. Ct. at 2738. The qualified immunity doctrine attempts to balance, on one hand, the need to protect officials who are required

to exercise their discretion and the interest of the public in the vigorous exercise of public authority against, on the other hand, the availability if a damages remedy to protect rights of citizens. *Id.*

An official seeking immunity "bears the initial burden of showing that public policy requires such an exemption. *Id.* The burden shifts to Plaintiff to show "facts that, if true, defeat the assertion of the doctrine." *Id.*

Qualified immunity protects officials from being subject to suit, thereby providing a layer of protection in addition to the defense that they exercised a "bona fide professional judgment as to where to place the children in their custody" which is still available if immunity is denied. *K.H. ex. rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) ("Murphy")

This Court held that the right of foster children to be free from the infliction of unnecessary harm, which Plaintiffs claim, was not clearly established in the period of time in question, May 1987 through November 1990. Linda Skipski was thus afforded qualified immunity.

The Rights of the Children in Foster Care as Established by the Supreme Court and Other Jurisdictions

Plaintiffs argue that the Court defined too narrowly what was required to make constitutional duties "clearly established" unless it is controlling law authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state. *Robinson v Bibb*, 840 F.2d 349, 351 (6th Cir. 1988).

Plaintiffs maintain that the right they assert was clearly established by the Supreme Court and thus was established in this jurisdiction. Plaintiffs cite *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that the state had

a duty to provide adequate medical care to incarcerated prisoners, and *Youngberg v. Romeo,* 457 U.S. 307 (1982), which held that state had a duty to provide a person in a state home for the retarded with services necessary to insure reasonable safety. Plaintiffs also point to several federal court opinions issued between 1983 and 1990 which held that children in foster homes have a right to be protected from harm: *K.H. ex. rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987),*cert. denied*, 489 U.S. 1065, 109 S.Ct.1337 (1989); *Doe v. New York City Dept. of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert. denied* 464 U.S. 864, 104 S.Ct. 195 (1983).

The *Murphy* decision is most pertinent to the issue before this Court. In *Murphy* the Seventh Circuit discussed in depth whether the right claimed by a foster child was clearly established at the time of the alleged violation. 914 F.2d at 850-53. The court noted that for liability to attach, Plaintiff cannot assert merely a general due process right but must show that the specific right asserted by the Plaintiff has been "either expressly established by, or clearly implicit in" existing law. *Id.* at 850. The fact that liability can be predicted is not enough top justify denial of immunity. *id.* at 851.

In *Murphy* the claim, in part, was that defendants had deliberately placed a child in a succession of foster homes known to be inadequate. The court held that the Supreme Court, in *Youngberg v Romeo*, had clearly established the duty, on the part of state officials, "to take steps to prevent children in state institutions from deteriorating physically or psychologically." *Id.* The court stated the duty articulated in *Youngberg* clearly extended to children in foster care because "[i]t should have been obvious from the day *Youngberg* was decided that a state could not avoid the responsibility which that decision

placed on it merely by delegating custodial responsibilities to irresponsible private persons." *Id.* The court thus denied immunity to Defendants on charges of placing children with foster parents having a known propensity to neglect or abuse children on the grounds that "*Youngberg* made the basic duty of the state to children in state custody clear, and *Doe* [supra] added the obvious corollary that the duty could not be avoided by substituting public for private custodians." *Id.* at 852. The court added that "no case held the contrary and there was no reason to think that *Doe* would not be followed by this circuit." *Id.*

In this Court's November 25, 1992 Opinion, the issue was described as "whether the right of a foster child to be free from unnecessary harm was sufficiently clear between May 1987 and November 1990 so that a 'reasonable official would understand that what he was doing violated the law.'" Opinion at 9 (quoting *Poe v Haydon*, 853 F.2d 418, 423-24 (6th Cir. 1988), *cert denied*, 488 U.S. 1007, 109 S.Ct. 788 (1989)). Although *Murphy* presents a compelling analysis for concluding that the right of a foster child to be free from unnecessary harm was clearly established during this period, nevertheless, qualified immunity must be provided to Skipski under the facts of this case and the law of the Sixth Circuit regarding qualified immunity and its opinions regarding duties toward foster children.

Sixth Circuit Law on Duties to Children in Foster Care

The sixth Circuit cases directly relevant to whether the right of foster children to be free from unnecessary harm was clearly established in *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989) *cert denied*, 496 U.S.931, 110 S.Ct. 2631 (1990), which held that the right was not clearly established from 1974 through 1982, and *Meador v Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.

1990), *cert denied*, 111 S.Ct. 182 (1990), which determined that children in state-regulated foster homes have a substantive due process right to "be free from infliction of unnecessary harm." *Id.* at 476.

In *Karman* the court of appeals discussed the implications of *Youngberg* on a state's duty toward children placed in foster care rather than in an institution. That discussion makes it impossible for this Court to hold that the obligations of state foster care workers were clearly established prior to the *Meador* decision. The *Karman* court stated that "a child in foster care is at least arguably not in the custody in the sense of *Youngberg*." 889 F.2d at 710. The court reasoned that because foster care, by design, provides a home-like setting, "the control the State may exercise over the child and thus the protection it may provide him with is diminished." *Id.* Declining to regard the Second Circuit's decision in *Doe* as dispositive, the Court held that the differences between institutional and foster care "raise serious questions as to whether foster care placement is sufficiently analogous to institutionalization so that a reasonable official would understand that, as a matter of law, the Fourteenth Amendment's Due Process Clause imposed similar affirmative obligations on him or her." *Id.* at 711. As to the authority of *Doe* in this Circuit, the *Karman* court said:

> As noted above, however, our court will not be easily swayed by the decisions of circuit and district courts other than our own when determining whether a constitutional right has been clearly established in this circuit. Here, only a single circuit court and a single district court, both outside of our jurisdiction, had recognized the right in question during the time period that Eugene's rights were allegedly violated. *Harlow's* objective legal reasonableness" test does not require state officials to know and

> to follow the most advanced state of the law as established by a remote court of the land. Accordingly, we are convinced that these cases alone do not, as a matter of law, clearly establish in our circuit, during the relevant time period, the constitutionally imposed affirmative obligations Eugene claims are at issue in this case. (Citations omitted.)

889 F.2d at 708.

Thus, those under the jurisdiction of the Sixth Circuit cannot say, as the *Murphy* court said, that the rights of young children in foster care was clearly established by *Youngberg* because "there was no reason to think that *Doe* would not be followed in this circuit." 914 F2d at 852. As the discussion in *Karman* shows, foster care workers in Michigan had a good reason to think that the Sixth Circuit would not follow *Doe*.

The status of the law changed, however, in May 1990, when the court in *Meador* followed *Doe* and held that children in foster care had a due process right "to be free from the infliction of unnecessary harm." 902 F.2d at 476. After *Meador* was decided, the right of children in foster care to be free from the infliction if unnecessary harm is clearly established in this jurisdiction. It remains for this court to determine whether and to what extent that right is implicated in the instant case in the critical time period of June through November 1990.

Plaintiffs' complaint claimed the children's rights were violated through a series of actions and inactions from the time they were placed in the Krause home in May 1987 through November 1990, when they were removed from the placement. Plaintiffs argue that the children should not have been placed with the Krauses from the start because Skipski knew or should have known that the Krause home was unsuitable as a foster

home and that Skipski should have removed the children immediately when a claim of sexual abuse was clearly articulated on October 8, 1990. Plaintiffs also chronicle a series of events that they allege should have alerted Skipski to the abuse the children allegedly received, including two incidents in 1988 and an incident on October 2, 1990.[7] Mrs. Krause reported on October 2, 1990 that one of the Lintz boys had said to the other "you pull my pants down and I'll pull your pants down." Plaintiffs claim that these incidents required immediate investigation and action.

Of Plaintiffs' allegations, only those that occurred in mid 1990 through the removal of the children from the Krauses' home in November 1990 can be considered. The others fall within the period during which foster care workers enjoyed qualified immunity for all their actions in this jurisdiction. Thus, the only claims at issue are the allegations that the October 2, 1990, incident should have prompted an investigation and that the children should have been removed from the Krause home immediately after the allegation of abuse was made on October 8, 1990. In essence, ps are asserting that the incident reported to Skipski constitutionally obligated her to conduct an investigation and that, at the time an explicit allegation of abuse was made, Skipski was constitutionally obligated to remove the children from the foster home immediately.

The pleadings and the affidavits and documents submitted in connection with eh motion for summary judgment show that, when the accusations of sexual abuse

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[7] Plaintiffs also allege that an incident occurred on July 17, 1990, but have provided no specifics about the incident nor produced any discernable documentary support.

were made on October 8, Skipski took immediate action to protect the children. She met with Mrs. Krause and set up safeguards to insure that the children were fully supervised and would not suffer any abuse before they were removed. Skipski searched for a place to send the children and discussed emergency placement with the attorney for Mrs. Lintz and the guardian ad litem for the children, both of whom apparently opposed moving the children immediately.

The claims Plaintiffs raise and the facts presented do not present a case like *Murphy*, in which Defendants allegedly placed a child in harm's way, in disregard of her rights, by putting her in a succession of foster homes known to be deficient. When analyzed under applicable law, these facts support qualified immunity for Skipski. In *Poe v Haydon*, 853 F.2d 418, 427 (6th Cir.1988), the court considered a claim that state officials had failed to conduct a proper investigation of alleged sexual harassment and failed to take particular steps following the investigation. The court noted that Plaintiff's superiors conducted investigations after they were alerted to possible sexual harassment and held that Plaintiff "did not have a clearly established constitutional or statutory right to a specific outcome following an investigation." *Id.*

In the instant case, Plaintiffs have not established that the reports of talk between brothers or pulling each other's pants down create a constitutional right to an investigation of the foster placement or any other particular action. As soon as allegations of sexual abuse arose, Skipski took actions to protect the children. Under the declaration in *Meador* that children in foster care have the right to be "free from unnecessary harm," the children had a constitutional right to have protective action taken. They did both, however, have a clearly established right to the specific actions Plaintiffs claim should have been taken.

Applying the test recently reiterated by the Sixth Circuit, ps have shown neither that a clearly established right was violated by Skipski nor that a reasonable social worker in Skipski's position should have known that the conduct at issue violated that right. *Meyers v City of Cincinnati*, 979 F.2d at 1156. Thus, Skipski is entitled to qualified immunity for the time period after the *Meador* decision as well as the earlier period.

Conclusion

The decision to grant Skipski qualified immunity was correct for the reasons stated above. Although the right of foster children to be free from unnecessary harm was clearly established in *Meador* in May, 1990, the right Plaintiffs assert to an investigation and a particular outcome are not clearly established under law. Skipski met her initial burden justifying immunity and Plaintiffs have failed to meet their burden of showing facts to defeat qualified immunity on their claim. Thus, qualified immunity will be extended to any other state actor subject to Plaintiffs' claims.

An amended complaint named two additional defendants, Mitchell Walker, the Cass County Probate Court Foster Care Licensing Agent and Robin Zollar Smietaka, a counsellor with Assault Recovery Associates. Defendant Walker responded to the motion for reconsideration by asking the Court to affirm its decision and to extend qualified immunity to him. He also submitted a motion for summary judgment that makes the same request.

Walker's motion for summary judgment is **GRANTED**. The claim against him is dismissed on the grounds of qualified immunity. In addition, Plaintiffs'

motion for reconsideration is *DENIED*. An Order consistent with this Opinion will be issued.

Dated: February 22, 1993

GORDON J. QUIST
United States District Court Judge

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHILD CARE ORGANIZATIONS

722.115. Licenses or certificates of registration; necessity, application, issuance; family day care homes, foster family homes, unlicensed residences, placement of children in adult foster care facilities, placement of adults in foster family homes.

Section 5. (1) A person, partnership, firm, corporation, association or nongovernmental organization shall not establish or maintain a child care organization unless licensed or registered by the department. Application for a license or certificate of registration shall be made on forms provided, and in the manner prescribed, by the department. Before issuing or renewing a license, the department shall investigate the activities and proposed standards of care of the applicant and shall make an on-site visit of the proposed or established organization. If the department is satisfied as to the need for a child care organization, its financial stability, the good moral character of the children, the department shall issue or renew the license. As used in this subsection, "good moral character of the applicant, and that the services and facilities are conducive to the welfare of the children, the department shall issue or renew the license. As used in this subsection, "good moral character" means good moral character as defined and determined pursuant to Act No. 381 of the Public Acts of 1974, as amended, being sections 338.41 to 338.47 of the Michigan Compiled Laws.

CHILD PROTECTION

722.623 Required Reports of child abuse or neglect; disposition

Sec. 3. (1) A physician, coroner, dentist, medical

examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. If the reporting person is a member of the staff of a hospital, agency or school, the reporting person shall notify the person in charge of the hospital, agency or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. One report from a hospital, agency or school shall be considered adequate to meet the reporting requirement. A member of the staff of a hospital, agency or school shall not be dismissed or otherwise penalized for making a report required by this act or for cooperating in an investigation.

(2) The written report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides and the child's age. The report shall contain other information available to the reporting person which might establish the cause of the abuse or neglect, and the manner in which the abuse or neglect occurred.

(3) The written report shall inform the reporting person of the required contents of the written report at the time the oral report is made by the reporting person.

(4) The written report required in this section shall be

mailed or otherwise transmitted to the county department of social services of the county in which the child suspected of being abused or neglected is found.

(5) Upon receipt of a written report of suspected child abuse or neglect, the department may provide copies to the prosecuting attorney and the probate court of the counties in which the child suspected of being abused or neglected resides and is found.

(6) If the report or subsequent investigation indicates a violation of sections 136b and 145c or sections 520b to 520g of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.136b, 750.145c to 750.520g of the Michigan Compiled Laws, or if the report or subsequent investigation indicates that the suspected abuse was not committed by a person responsible for the child's health or welfare, and the department believes that the report has basis in fact, the department shall transmit a copy of the written report and the results of any investigation to the prosecuting attorney of the counties in which the child resides and is found.

(7) If a local law enforcement agency receives a written report of suspected child abuse or neglect, whether from the reporting person or the department, the report or subsequent investigation indicates that the abuse or neglect was committed by a person responsible for the child's health or welfare, and the local law enforcement agency believes that the report has basis in fact, the local law enforcement agency shall provide a copy of the written report and the results of any investigation to the county department of social services of the county in which the abused or neglected child is found. Nothing in this subsection or subsection (6) shall be construed to relieve the department of its responsibility to investigate reports of suspected child abuse or neglect under this act.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROGER STONECIPHER, REBECCA STONECIPHER, ROBERT STONECIPHER AND DAVID STONECIPHER by ROGER STONECIPHER AND REBECCA STONECIPHER, as Next Friends,

Plaintiffs,

v. No. 88CV74415DT

ONSTED COMMUNITY SCHOOLS, ONSTED BOARD OF EDUCATION, EUGENE DEUEL, superintendent of Onsted Community Schools, CHARLES REDDING and D. MICHAEL HORNING, individually and in their individual capacities, jointly and severally,

Defendants.
_____/

OPINION AND ORDER

This is a section 1983 case. Plaintiff, Robert Stonecipher (Robert), an emotionally handicapped seventh grade student at the Onsted Middle School reported to the principal that another student had offered to sell him drugs. Without asking the permission of Robert's parents, the principal gave him a marked dollar bill and instructed him to go through with the purchase. After the sale was made, the drug-selling student was confronted by school officials and suspended. They turned the matter over to the county juvenile authorities. As the facts surrounding Robert's role in the incident became widely known, Robert and his identical twin brother David Stonecipher

(David), began to suffer both verbal and physical harassment at the hands of the other students, who called them 'narc' and 'stoolie.' Several weeks after the drug buy, the Stonecipher family began receiving anonymous death threats over the telephone. They immediately removed Robert from school. They removed David a few days later, after he was attacked by a group of students in a gym class. The school district provided an in-home tutor and the boys were able to finish the school year and were promoted to the eight grade. However, the Stoneciphers still feared for their childrens' safety and decided to leave the state. This lawsuit followed.

Roger and Rebecca Stonecipher, for themselves and for their minor children Robert and David, sue the Onsted Community Schools (the school district), the Superintendent of Schools, and the two principals directly involved, for the deprivation of their right to a free public education (Count I), violation of their right to be secure in their persons (Count II), negligence (Count III), a violation of their right to control the lives of their children (Count IV) and failure to train and supervise (Count V). Plaintiffs have moved for summary judgment, arguing that the undisputed facts of this case establish liability as a matter of law. Defendants have filed a cross-motion for summary judgment, contending that at most, their actions were merely negligent and that they were protected by constitutional and state law immunity. The Court finds that there is no basis for holding either the school district or the superintendent liable for this incident and their motions for summary judgment will be granted. As to the principals, the Court holds that a jury must determine whether their actions rose to the level of gross negligence necessary to hold them liable under state and federal law, and their motions for summary judgment will be denied. The reasons follow:

I. FACTS.

Both Robert and his brother David had experienced emotional problems before the drug selling incident. Ms.

Stonecipher had Robert and David before she married their first adopted father, James Kubat in 1978. She described her marriage to Mr. Kubat as chaotic and abusive, and they were divorced in 1984. She married Mr. Stonecipher in 1985 and he subsequently adopted Robert and David. The boys both took Ritalin for a period in the second grade to control hyperactivity. Social Work Evaluation of Robert Kubat, Plaintiff's Exhibit No. 10. Robert was designated as "emotionally impaired" by school authorities and received counseling once a week. Defendants' stipulated Facts paras. 7-8.

Ms. Stonecipher periodically complained to school authorities about their handling of her boys. In January 1986, a gym teacher lifted Robert off the ground by his shirt, ripping it. Ms. Stonecipher complained to Onsted Middle School principal Michael Horning (Horning) about the incident and he agreed to circulate a note to the other faculty instructing them not to physically manhandle Robert. Rebecca Stonecipher Dep. at 21-22; Plaintiff's Exhibit 7. Soon after, another teacher pulled David out of his seat by his shirt in a study hall for talking. A meeting was held with the Stoneciphers regarding this incident, at which Ms. Stonecipher told Horning that he had better inform his staff "they weren't as much to breathe heavy over my kids" or she would take them to court.*Id.* at 82-85. On another occasion, Ms. Stonecipher called Horning to complain that she believed Robert was receiving drugs at school because he would frequently take naps when he got home. Defendant Horning and Redding's Answers to Plaintiffs' interrogatories No. 21.

On March 15, 1987, Robert was attending a shop class at Onsted High School, which is directly adjacent to the Middle School. During the period, he and a classmate, Chad Baughey (Chad), were approached by a high school student, Gerald Kier (Gerald), and asked whether they wanted to buy some speed for seventy-five cents. Robert Stonecipher Dep. 7-9,13 After class,

Robert went to report the incident to Horning, who was not in his office at that time. Robert returned to the office the next day with Chad, and recounted the entire incident to Horning. *Id.* Robert alleges that Horning "wanted us to go make the buy." *Id.*, at 13. Horning disputes this characterization, claiming that the boys told him their story and asked whether there was anything they could do to help. Horning then called Charles Redding (Redding), the principal of Onsted High School, who suggested that "if they want to, you know, see if they could buy something and come to my office." Horning Dep. at 44-45. It has been stipulated that at no time did either Horning or Redding contact the Stoneciphers to inform them of what was happening or secure their consent. Defendants Stipulated Facts para. 20. Horning also admits that he was aware of Robert's emotionally impaired status at this time. *Id.* at para. 11.

Horning then took out a dollar bill, copied down the serial number, made a mark on it with a red pen, and xeroxed it before giving it to Robert. Robert Stonecipher Dep. at 13-14. Robert then proceeded to his shop class, where he met with Gerald and purchased two pills with the dollar bill Horning had given him. *Id.* at 16. Robert and Chad then turned the pills over to Redding as they had been instructed by Horning. *Id.* at 17 -21. The pills were white with blue specs and the word "Caffeine" was printed on one. Complaint Report of Lenawaee County Sherriff's Department, dated March 16, 1988, Plaintiff's Exhibit 12. In fact, the pills turned out to be caffeine, which Gerald had taken from his parent's medicine chest. Defendant's Stipulated Facts para. 23.

Redding called Gerald into his office about forty-five minutes later and asked to see any money he had. Gerald gave him the dollar bill and Redding called Horning and verified that it was the marked bill. Redding then questioned Gerald about the sale and he admitted that he told Robert that and Chad that they were buying speed. Redding then told Gerald that he

was suspended and called his father. Redding then contacted the Lenawee County Sherriff's Department and filed a criminal complaint against Gerald for possession with intent to distribute an imitation controlled substance, Mich. Comp. Laws § 333.7341(3), a felony punishable by imprisonment for up to two years and a fine of up to $10,000 or both.

Later that afternoon, when Robert returned to class, other students whom he did not know began calling him 'narc' and 'snitch,' Roger Stonecipher Dep. 25-32. The name calling continued thereafter. *Id.* at 35. On March 18, two high school students accosted Robert on his way to his bus, pushing him against a dumpster and calling him a narc. *Id.* at 39-40. About mid-April the family started receiving phone calls in which anonymous persons threatened to maim and kill Robert for his role in the incident. The Stoneciphers reported the threats to the state police and Lenawee County Sherriff's Deputy J.D. Clark. Roger Stonecipher recorded several of the calls, all of which made reference to Robert's role as an informant. Roger Stonecipher Dep. at 84. The Stoneciphers informed Redding of the calls. *Id.*

After the first phone calls were received on April 12, the Stoneciphers removed Robert from school. Defendants' Stipulated Facts para. 26. On or about April 13, the Stoneciphers received a phone call from Onsted School Superintendent Eugene Deuel (Deuel), who had just been appraised of the situation by Redding. At that time, Roger informed Deuel of the phone threatening calls. Deuel apologized profusely about the incident, claiming that "he couldn't believe" that Horning would place Robert in this kind of situation.

> We never do anything like that without checking with the parents, God! .... Here's a couple of kids we have been working for, you know, how many years, and I see all this improvement and everything positive happening, and now you put those kids out there in that position ... Those kids

> are going to be after them that are involved in this .... {this} never, never should have happened .... [Horning and Redding] bungled it....This was blown from day one to day two....That's the problem right there. Adults would get over it, but you know, we are dealing with kids. They are young and impressionable; two boys had a tough time and now have got some stability in their life , and so on and so forth, and now all of this ....[Although I will try to make sure this doesn't happen again,] Jesus, that doesn't rectify what has happened.

Defendant's Response to Requests for Admissions to Eugene Deuel, appended as Exhibit 3 to ps' Brief in Opposition to Defendants' Motion for Summary Judgment.[1] On April 14, Redding came to the Stonecipher home to discuss the phone calls with Roger. Roger Stonecipher Dep. 35-41. Roger testified that Redding said "Boy Roger, I guess I really screwed up. I just found out and I'm sorry. What can I say?" Redding allegedly told Roger that he would do everything he could to keep Robert from having to testify in court against Gerald, even if he had to drop the charges. *Id.* at 123-24.[2]

On April 19, David was involved in a fight with several other students in gym class. David claims that David himself provoked the April 19 incident and that it was unrelated to the drug purchase. Horning Dep. at

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[1] Unbeknownst to Deuel, the Stoneciphers recorded his phone call. Rebecca Stonecipher Dep. 87-89; Robert Stonecipher Dep. 37-38.

[2] Redding did, in fact, drop all of the charges against Gerald on April 21, 1988. Plaintiffs' Stipulated Facts para 44.

163-73. David testified that after the fight, he went to Horning's office and, weeping, told him that he was afraid to stay in school. *Id.* at 14. Horning called Ms. Stonecipher and she and her husband took David home. At that time they told Horning that they intended to contact their lawyer. Rebecca Stonecipher Dep at 32. They withdrew David from attendance at school. Defendants Stipulated Facts No. 27. The Stoneciphers then sent the boys to live for a period with a family friend in Claire County, about three hours north. Rebecca Stonecipher Dep. at 91.

On April 28 the Stonecipher's attorney wrote Deuel a letter requesting an in-home tutor to allow the boys to finish out the school year. Plaintiffs' Exhibit 13. Deuel granted the request and Roger and David completed their studies and were promoted to the eighth grade. During the late summer of 1988, the Stoneciphers moved to Kentucky. Defendants' Stipulated Facts para. 33.

After the end of the school year, Deuel conducted an investigation of the incident to determine whether Horning or Redding should be sanctioned. The investigation merely consisted of talking to both men. Following the inquiry, Deuel concluded that both men had acted properly and that no reprimand was warranted. Deuel Dep. at 77-82.

II. PLAINTIFFS' FIRST AMENDED COMPLAINT.

Plaintiffs have alleged a variety of constitutional and state law torts in their fist amended complaint. However, some of the theories advanced are vague and others totally unrecognizable. At a hearing held on the parties' cross-motions for summary judgment, the Court rejected outright some of Plaintiffs' claims and suggested that others be reformulated to bring them into somewhat more familiar territory. To this end, the Court directed Plaintiffs to submit their portion of the joint pre-trial order stating with particularity their claims for relief

against each Defendant. Plaintiffs have done so. Although a marginal improvement over the first amended complaint, Plaintiffs portion of the joint pretrial order hopelessly conflates different theories of recovery into individual counts and fails to distinguish between federal and state law claims. To clarify matters, the Court will consider the viability of each of the counts of the first amended complaint, as supplemented where necessary by the joint pretrial order. The Court will then go on to evaluate Defendants' affirmative defenses as to the remaining counts.

A. Deprivation of a Free Public Education in Violation of the First Amendment to the U.S. Constitution and Art. VIII of the Michigan Constitution.

Plaintiffs allege in Count I of their first amended complaint that Defendants violated their right to a free public education in violation of the First Amendment to the U.S. Constitution. While it is no doubt true that the First Amendment protects academic freedom, *Keyishian v Board of Regents*, 385 U.S. 589, 603 (1967), and the citizens' right to pursue ideas and learning, *Board of Education v Pico,* 457 U.S. 853, 866-69 (1982), it does not guarantee a student's access to the public schools. ps have cited no cases which would suggest that the First Amendment has any relevance to this case and the Court is aware of none.

Plaintiffs' reliance on Article VIII of the Michigan constitution os similarly misplaced. The relevant portion of Article VIII for the purposes of this case is section 2, which provides that the state shall maintain a system of free public education and secondary schools and that such education shall be provided without regard to religion, race, creed, color, or national origin. However, there is no allegation in this case that Roger or David's withdrawal from the Onsted schools was a result of racial

or religious discrimination and thus Article VIII does not help them. Count I will therefore be dismissed.

B. Deprivation of the Right to be Secure in Their Person.

In Count II of the first amended complaint, Plaintiffs claim that they suffered a deprivation of their constitutional right to be secure in their person, as guaranteed by the U. S. and Michigan Constitutions. The complaint did not, however, identify the specific constitutional provision on which Plaintiffs were relying. Initially there was some indication that Plaintiffs meant to invoke on the Fourth Amendment to the U.S. Constitution and Art. I, §7 of the Michigan Constitution. However, the joint pe-trial order suggest that they instead intended to rely on the substantive due process component of the Fourteenth Amendment. This claim is clearly sound. The Fourteenth Amendment has been construed to protect citizens from unjustified intrusions on their personal security by the state. *Youngberg v. Romeo,* 457 U.S. 307, 315-316 (1982). Numerous cases have been held that students in particular have a due process right to be free from physical abuse in school. *Ingraham v. Wright*, 430 U.S. 651, 673 (1976); *Stoneking v. Bradford Area School District,* 856 F.2d 594, 599 (3rd Cir. 1988), *vacated and remanded* 103 L.Ed. 804 (1989), *on remand* 882 F.2d 720 (3rd Cir. 1989); *Garcia v. Miera,* 817 F.2d 650, 656-658 (10th Cir. 1987), *cert denied* __ U.S. __, 99 L. Ed. 2d 421 (1988); *Hall v Tawney*, 621 F.2d 607, *cert denied*, -- U.S. --, 99 L.Ed.2d 421 (1988). Moreover, a person need not suffer actual physical harm in order to recover on this theory. Mental and emotional harms alone can suffice. *See e.g. White v Rochford*, 592 F.2d 381, 385 (7th Cir. 1979). Thus, Plaintiffs can allege a violation of their liberty by being recklessly placed in danger by school officials.

Plaintiffs can also allege an unconstitutional

deprivation of their property as a result of Defendants' actions. The Supreme Court has long held that the arbitrary deprivation of a benefit or entitlement conferred by state law can violate the due process clause of the Fourteenth Amendment. *Cleveland Board of Education v Loudermill*, 470 U.S. 532 (1984); *Perry v Sinderman*, 408 U.S. 593 (1972); *Board of Regents v Roth*, 408 U.S. 564 (1972). Clearly Article VIII, §2 of the Michigan Constitution conferred on Plaintiffs a property right to attend the Michigan public schools. The deprivation of this right through Defendants alleged recklessness is sufficient to state a substantive due process violation.

Defendants argue that ps have failed to state a prima facie claim under the Fourteenth Amendment because the conduct alleged is, at most, negligent. It is well established that the mere negligence of a state officer is insufficient to state a violation of due process. *Daniels v Williams,* 474 U.S. 327 (1986) However, the Supreme Court in *Daniels* reserved the question of whether recklessness or gross negligence is sufficient to support a due process claim *Id.* at 334 n.3. The Sixth Circuit Court of appeals has answered this question in the affirmative, holding that gross negligence by state officials which proximately causes harm is sufficient to state a section 1983 claim. *Nishiyama v. Dickenson County*, 814 F.2d 277 (6th Cir. 1987) (en banc). *See also Brandenburg v. Cureton*, 882 F.2d 211, 214 (1989). Gross negligence may be found where an official

> intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Nishiyama, 814 F.2d at 282.

Defendants claim that this case involves, at most, mere negligence and that under *Daniels* no section 1983 claim can be made.3 This question must be left to the jury. Defendants in their briefs more or less concede that

Horning and Redding were negligent in selecting Robert Stonecipher to make a controlled drug purchase and in not notifying his parents. Certainly the alleged admissions of defendants Deuel and Redding are strongly probative of negligence. Indeed, if simple negligence were all plaintiffs ultimately had to show, the Court might well be inclined to grant their motion for summary judgment. However, it would be inappropriate for this Court to unilaterally determine whether defendants' conduct did or did not rise to the level of gross negligence. Rather, this is a matter upon which reasonable minds could differ and must therefore be left to the finder of fact.

Defendants also contend that the recent Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*, _U.S._, 103 L.Ed.2d 249 (1989), requires dismissal of plaintiffs' substantive due process claims. They argue that *DeShaney* stands for the proposition that the state has no Fourteenth Amendment obligation to protect citizens from the acta of third parties over which they have no control. Defendants'

3. Defendants also claim that the Court should not even reach this question, because plaintiffs did not plead gross negligence in their first amended complaint. As noted above, plaintiffs do appear to have had considerable difficulty formulating their claims. However, the joint pre-trial order contains sufficient allegations of gross negligence and recklessness to put defendants on notice of what they will have to defend against. There is no indication that defendants have been prejudiced in any way from plaintiffs' initial lapse. The complaint should therefore be considered amended to include an allegation of gross negligence and recklessness. reliance on this case is misplaced. In *DeShaney*, the Supreme Court expressly distinguished between situations where the state merely fails to rescue a person threatened by an uncontrollable private party and those in which the state itself injures of endangers a person through the

affirmative acts of its agents. No section 1983 liability will inhere in the former situation. However, in the latter case, the state would certainly be liable. The facts here more closely resemble the latter case. Plaintiffs have alleged that the reason that their children were threatened was because defendants affirmatively made the decision to place Robert in the position of a drug informant. They were endangered by a state agent, acting in his official capacity, in a state facility. Unlike the situation in the *DeShaney* case, plaintiffs here never would have been put in danger but for the deliberate actions of defendants. *Cf. Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989). Accordingly, *DeShaney*, is inapposite.

C. Common Law Negligence.

In Count III of their complaint, plaintiffs allege that defendants were negligent. Although this claim is sound on its face, defendants has asserted the formidable defense of governmental immunity. Because the immunity issues will differ among the various defendants, they will be considered in detail, *infra*.

D. The Right to Govern One's Children

Count IV of the first amended complaint alleges that defendants violated plaintiffs' right to govern the lives of their children. In support of this claim, plaintiffs cite *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *Stanely* involved a due process/equal protection challenge to a state statute automatically divesting unmarried natural fathers of all parental rights over their children upon the death of the natural mother. Defendants argue that *Stanley* is inapposite because it merely held that the equal protection clause prohibited a state from making an arbitrary distinction between unmarried fathers and those who were merely divorced or separated. Defendants' rejection of *Stanley* in this context is altogether too hasty.

In balancing the respective interests of the state and the natural father, *Stanley* relied on a long line of

Supreme Court cases discussing the fundamental right of natural parents to control the rearing and education of their children. *See e.g. May v. Anderson*, 345 U.S. 528 (1953); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The two seminal cases in this area are *Meyer* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Meyer*, the Supreme Court invalidated a Nebraska law prohibiting the teaching of a foreign language to children below the eight grade. In *Skinner*, the Court struck down an Oregon statute requiring all children between the ages of 8 and 16 to attend public, rather than parochial schools. Both *Meyer* and *Pierce* relied on the liberty component of the Fourteenth Amendment of their children. The Supreme Court reasoned that "the child is not the mere creature of the state." *Pierce*, 268 U.S. at 535.

> Without doubt [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home, and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 299. [emphasis added]. As noted in *Stanley*, the Supreme Court has frequently reaffirmed its belief in parental preeminence as to decisions about children.

> The natural rights of the parent to the custody and control of his infant child are subject to the power of the state, legislative or judicial action.

59 Am. Jur.2d *Parent and Child* S 11 (1987). A parent certainly does not have the "right" to neglect or abuse his or her children and the state itself may, within limits, define the scope of acceptable conduct. Likewise, parents do not have the right to refuse beneficial medical

treatment on behalf of a child, even if such refusal is based on religious scruples. *See* Annotation, *Power of Court to Order Medical Treatment Over Parental Religious Objections for Child Whose Life Is Not Immediately Endangered*, 52 A.L.R.3d 1119 (1973). Nearly all states have compulsory education laws which impose mandatory educational requirements, notwithstanding a parent's objections, 59 Am. Jur.2d *Parent and Child* S 46 (1987). Both the states and the federal government impose conditions and limitations on child labor. Where minor children violate the criminal laws, the states may remove them from the custody of their parents and place them in juvenile or adult detention centers. Finally, unemancipated minors even enjoy a constitutionally protected right to secure birth control and abortions, even over the objections of custodial parents. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *reh. denied*, 444 U.S. 887 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979). In all of these situations, a parents' right to control his or her children do not overcome the countervailing interests of the child and/or the state.

Given the murky status of this area, the Court is not now prepared to recognize a generalized right to control one's children as an independent ground for recovery under 42 U.S.C. S 1983. While the necessity of parental consent may be readily manifest in this particular case, basing this requirement on such a broad and abstract right could have far reaching implications that the Court can only begin to imagine. Such a task is better left to the appellate courts.

E. Failure to Train and Supervise.

In count V of their first amended complaint, plaintiffs allege that the School Board failed to promulgate policies, rules, or regulations to guide administrators in the proper procedures for investigating allegations of criminal activities. Plaintiffs do not, however, state whether this claim is based on federal law, state law, or both. The constitutional tort of failure to train is

universally recognizes failure to train and supervise as a common law tort. *Millross v. Plum Hollow Golf Club*, 429 Mich. 178, 193-94 n.6 (1987) *citing* Restatement (Second) of Agency S 213. The Court will therefore treat both theories as having been duly alleged and go on to evaluate them on their merits.

III. DEFENDANT SCHOOL BOARD'S LIABILITY UNDER SECTION 1983.

A. Policy or Custom.

Defendant school board moves for summary judgment on the grounds that it cannot be held liable for the misconduct of subordinates unless it can be shown to have authorized a policy or custom which led to the alleged constitutional deprivations. The school board's argument has merit.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a municipality could not be held liable for the constitutional torts of its agents on the basis of *respondeat superior*. A municipality could be subject to section 1983 liability only when "the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. In addition, adherence to an unconstitutional "custom or practice" which has not received formal approval could also subject a municipality to 1983 liability, but only where such a custom is so persistent and widespread as to acquire the "force of law." Id. at 691. The practice must be so widespread that it may be reasonably inferred that the governing body either knew or should have known of it. *Spell v. McDaniel*, 824 f.2d 1380, 1387 (4th Cir. 1987), *cert. denied*, 424 U.S. 1027 (1988). A single instance of a constitutional deprivation by a municipal employee is insufficient, in itself, to establish a custom or policy. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), *reh. denied*, 473 U.S.. 925 (1985).

However, once an unconstitutional policy is formally approved by an authoritative decisionmaker, a single application of that policy may be sufficient to establish liability. *Pembaur v. Cincinatti*, 475 U.S. 469, 480 (1986).

In order for an action to be considered an official "policy," it must be made or ratified by a decisionmaker having final authority to declare policy.

> [M]unicipal liability attaches where--and only where-- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Pembaur, 475 U.S. at 483. Moreover, the authority to make municipal policy must necessarily be the authority to make final policy. *City of St. Louis v. Praprotnik*, -U.S.-, 99 L.Ed.2d 107, 120 (1988).

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve the subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. at 120. [emphasis in original] The determination as to which policymaker may be said to be "final" in a particular area must be made with reference to state or local law. *Id.* at 118-120; *Pembaur*, 475 U.S. at 484.

In this case, state law makes clear that it is the school board, rather than individual principals, which has the power to establish policy as to disciplinary investigations within the schools. Under the School Code of 1976:

> The board of a school district shall make reasonable regulations relative to anything necessary for the

proper establishment, maintenance, management, and carrying on of the public schools of the district, including regulations relative to the conduct of pupils concerning their safety while in attendance at school or enroute to and from school.

Mich. Comp. Laws S 380.1300. Principals in fourth class school districts (i.e. those with between 75 and 2,400 pupils), may be hired by the board, which "shall define their duties." Mich. Comp. Laws S 380.132(2). The board of a Fourth Class school district employing more than twelve teachers must also retain a Superintendent of schools, who is statutorily authorized to:

(c) Supervise and direct the work of the teachers and the other employees of the board.

(g) Assist the board in matters pertaining to the general welfare of the school and perform other duties which the board requires.

(h) Put into practice the educational policies of the state and of the board within the means provided by the board.

Mich. Comp. Laws S 380.132(4). This statutory scheme demonstrates that the school board shall be the final arbiter of policy for the school district. The superintendent is hired to implement the policies promulgated by the board and supervise the work of the principals.

It is undisputed that the board established no formal policies with respect to investigations of criminal misconduct within the schools. Plaintiff's Answers to Defendant School District's Request for Admissions No. 12, 14. It was Horning and Redding alone who made the decision to use Robert Stonecipher in the drug buy and there is no evidence that the board was informed of this plan of action until well after the fact. Accordingly, the court finds that there was no "policy" of using students in drug buys without parental consent.

Plaintiffs argue that even if there was no policy of using students, defendant Redding's testimony establishes a custom of such use. Redding testified that he believed that students were used in drug purchases tow or three times in the past twenty years. On each occasion, he recalled, the parents were consulted in advance. It is unclear whether the board was notified of his practice. However, even assuming that they had actual knowledge, this would not establish a custom of unconstitutional endangerment of students. In each of theses cases, the parents of the decoy students were notified and consented to the proposed drug buy in advance. Plaintiffs have not alleged that a *consented* drug buy would have been unconstitutional. Plaintiffs' complaint is that Roger and Rebecca Stonecipher were not consulted. It is undisputed that this never occurred before. Consequently, no unconstitutional custom has been established. In light of plaintiffs' failure to demonstrate that the school board established a policy or ratified a custom of involving students in drug sting operations without the knowledge or consent of their parents, their substantive due process claim against the board will be dismissed.

B. Failure to Train.

The defendant School Board moves for summary judgement on plaintiffs' failure to train and supervise claim. The Board argues that under *City of Canton v. Harris*, -U.S.-, 103 L.Ed.2d 412 (1989), plaintiffs' allegations of its failure to better advise its principals of how to deal with drug offenders

> 4. This section will only deal with plaintiffs' constitutional failure to train claims and not with the analogous state law tort. Obviously, no action for the violation of state law can be brought under Section 1983. *Pennhurst State School and Hosptial v. Halderman*, 465 U.S. 89 (1984). Plaintiffs' state law failure to train claim will be discussed *infra*.

are insufficient to state a section 1983 claim. The Court

agree.

In *Canton*, the Supreme Court held that "the inadequacy of...training may serve as the basis of liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officials] come into contact." *Id.* at 103 L.Ed.2d 426. The facts of this case are simply insufficient to meet this standard. Defendants have testified that they conducted controlled-buy drug investigations only two or three other times over the last twenty years. During each of those times, the officials involved secured the permission of the parents of the decoy student before authorizing the buy. As noted earlier, the crux of plaintiffs' claim is that defendants chose to use a student in this operation without the consent of his parents and not that the consented use of a normal student would be per se unconstitutional. Under these circumstances, the Board's failure to adopt a training program on how to handle drug investigations could not be characterized as "deliberate indifference." Indeed, they had every indication that such investigations, on the rare occasions that they were necessary, were being properly handled. Accordingly, plaintiffs' constitutional failure to train and supervise claim against the defendant School Board will be dismissed.5

5. In light of the Court's disposition of plaintiffs' constitutional claims against the board, it is unnecessary to discuss the issue of whether the board was entitled to qualified immunity.

IV. DEFENDANT DEUEL'S LIABILITY UNDER SECTION 1983

Deuel moves for summary judgment on the constitutional claims against him on the grounds that he was not personally involved in the decision to use Robert Stonecipher in the drug buy. For reasons similar to those discussed as to defendant school board, above, Deuel

cannot be held liable under section 1983.

In order to establish 1983 liability against Deuel, plaintiffs must allege some level of personal involvement in the alleged constitutional violation. "Plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hayes v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982). An official's mere right to control or supervise, without any control or direction actually having been exercised and without any failure to supervise is insufficient to support section 1983 liability. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

In this case, it is undisputed that Deuel first heard of the Stonecipher incident on April 13, 1988, nearly a month after the events had occurred. There is no allegation that Deuel had anything to do with the decision to use Robert Stonecipher as a drug decoy. Other than providing an in-home tutor at the Stonecipher's request, Deuel's role consisted solely of an after-the-fact investigation.

Plaintiffs argue that Deuel's refusal to censure Redding and Horning constituted implicit ratification of their actions. The Court does not agree. First, the investigation was conducted after all of the participants knew that litigation was imminent. Any administrative finding of culpability would have been admissible at trial and obviously would have been highly damaging after the fact, it was logically unrelated to the alleged deprivation. In order to find S 1983 liability, the actions of supervisors must have been found to have caused the constitutional deprivation. in this instance, the allegedly wrongful conduct had been completed at the time Deuel became involved and nothing he did or failed to do at that point would have made any difference. There is a critical distinction between a supervisor who repeatedly fails to take corrective steps in the face of a clearly unconstitutional policy and one who fails to act after a

single incident. The former's omissions may be said to have caused the continuation of the custom, while the latter's could not. The facts here more closely approximate the latter case. Accordingly, there is no basis for imposing liability on Deuel for the alleged substantive due process deprivation and as to him that claim will be dismissed. In addition, for the reasons stated in S IV(B), *supra*, plaintiff's failure to train claims against Deuel will also be dismissed.6

6. In light of the Court's disposition of plaintiffs' constitutional claims against Deuel, it is unnecessary to discuss the issue of qualified immunity.

V. HORNING AND REDDING'S LIABILITY UNDER SECTION 1983.

Defendants Horning and Redding argue that plaintiffs' constitutional claims against them should be dismissed on the grounds of qualified immunity. The Court does not agree.

> Under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Plaintiffs do not dispute that Horning and Redding were performing discretionary functions when they made the decision to sue Robert in the drug buy. Rather, they argue that a reasonable person would have known that using an emotionally impaired student for such a purpose without the knowledge or consent of his parents was unconstitutional. Defendants dispute this, arguing that plaintiffs have failed to cite a single case holding that the use of an emotionally impaired student in a controlled drug purchase without the knowledge or consent of his parents is violative of the Fourteenth Amendment. The

Court finds that this articulation of the right involved is entirely too narrow. The relevant scope of inquiry is not drug buys, per se, but rather the duty of school officials to refrain from themselves injuring students or unreasonably placing them in danger of physical harm. *See e.g. Ingraham v. Wright*, 430 U.S. 651 (1976); *Stoneking v. Bradford Area School District*, 856 F.2d 594, 599 (3d Cir. 1988), *vacated and remanded* 103 L.Ed.2d 804 (1989), *on remand* 882 F.2d 720 (3d Cir. 1989); *Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). *cert. denied*, _U.S._. 99 L.Ed.2d 421 (1988). *Cf. Youngberg v. Romeo*, 457 U.S. 307 (1982) (inmate in mental institution has constitutional right to be protected from physical harm); *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (resident at quasi-juvenile detention center has constitutional right to be free from physically abusive discipline practices); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (inmate in mental institution has constitutional right to be protected from physical harm). This was not the ordinary situation where school officials made a decision upon which reasonable minds could differ. Reasonable minds do not differ over the impropriety of the alleged acts. Rather the only issue is the egregiousness of defendants' negligence. The Court finds that defendants' obligation to refrain from harming their students was sufficiently well established to defeat Redding and Horning's claims of qualified immunity.

VI. DEFENDANTS' STATUTORY IMMUNITY FROM LIABILITY FOR STATE LAW TORTS.

A. Direct Liability.

Counts III and V of plaintiffs' first amended complaint state claims for common law negligence and failure to supervise and train.7 Redding and Horning claim that they are not liable for these torts on account of the state governmental immunity

7. *See Supra* n.4.

statute. Mich Comp. Laws S 691.1407. That statute provides in relevant part

> (1)...all governmental agencies shall be immune from tort liability wherein the government agency is engaged in the exercise or discharge of a governmental function.
>
> (2)...without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each member of a board,...shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee or member while in the course of employment or service...while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, [or] member...is acting or reasonably believes that he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's employee's, [or] member's...conduct does not amount to *gross negligence* and that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate substantial lack of concern for whether an injury results.

[emphasis added]. The Court does not understand plaintiffs to dispute that at all times, defendants were performing governmental functions and that they were or reasonably believed that they were acting within the scope of their authority. Accordingly, there can be no

direct liability against the school district under Mich. Comp. Laws s 600.1407(1). Deuel, Redding, and Horning's liability, *vel non*, turn exclusively on whether their conduct rose to the level of gross negligence as defined by S 600.1407(2)(c). As discussed earlier, Deuel's connection with these events was highly attenuated. Nothing he did or failed to do could be fairly said to have been the proximate cause of plaintiffs' injuries. However, the question of whether Redding and Horning's conduct rises to the level of gross negligence is for a jury to decide.

B. Vicarious Liability.

Plaintiffs also argue that defendants Deuel and school board are vicariously liable for the torts of Redding and Horning. In *Ross v. Consumers Power*, 420 Mich. 567 (1984), the Michigan Supreme Court held that the doctrine of *respondeat superior* survived the enactment of the state's governmental immunity statute. The Michigan Supreme Court explained:

> A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which statutory activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e. the activity was expressly or impliedly authorized by constitution, statute, or other law), the agency is immune pursuant to S 7 of the governmental immunity act.

Ross, 420 Mich. at 624-25. Several subsequent Michigan Court of Appeals decisions have held that this analysis survives the legislature's 1986 reenactment of the

governmental immunity act. 1986 P.A. 175. *See Isabella County v. Michigan*, 181 Mich App. 99, 105-06 (1989); *Scameheorn v. Bucks*, 167 Mich. App. 302, 310-311, *lv. app. denied*, 430 Mich. 886 (1988); *Giddings v. Detroit Board of Education*, 178 Mich. App. 749 (1989).

Thus, under this analysis, the board could not be vicariously liable under *respondeat superior* for the acts of Redding and Horning. Hiring school principals is a function legislatively authorized for fourth class school districts. Thus vicarious liability cannot be established.

C. Intentional Nuisance.

Plaintiffs also attempt to avoid the dismissal of their claims under the governmental immunity act by pleading intentional nuisance. Intentional nuisance was traditionally an exception to the immunity act. *See e.g. Rosario v. Lansing*, 403 Mich. 124 (1978); *Gerzeski v. Dep't of State Highways*, 403 Mich. 149 (1978). However, a recent Michigan Supreme Court decision has called the continued viability of the intentional nuisance exception into question. *Hadfield v. Oakland County Drain Comm'r.*, 430 Mich. 139 (1988) (plurality opinion of Brickley, J.). On the facts of this case, however, it is not necessary to extensively consider the issues which divided the Michigan Supreme Court in *Hadfield* because no prima facie claim of intentional nuisance has been stated.

Although the difficulty of pinning down the precise elements of nuisance has been much lamented, *see Hadfield*, 430 Mich. at 150; *Rosario*, 403 Mich. at 131, it is safe to say that they involve dangerous conditions maintained on land, highways, and structures.

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in the highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care.

Rosario, 403 Mich. at 132, *quoting Buckeye Union Fire Insurance Co. V. Michigan*, 383 Mich. 630, 636 (1970). While there is a considerable overlap between the concepts of negligence and nuisance, *see Rosario*, 403 Mich. at 144-48 (Ryan, J., dissenting), at least this much is clear--the injury or damage must be caused by some dangerous condition of land, on a highway, or in a building. *Hadfield*, 430 Mich. 139 (flooding of land); *Veenman v. Michigan*, 430 Mich. 139 (1988) (dune buggy accident on public land); *Landry v. City of Detroit*, 430 Mich. 139 (1988) (attack in a public building with allegedly inadequate security); *McCaul v. Lake Odessa*, 430 Mich. 130 (1988) (flooding of farm land); *Rosario*, 403 Mich. 124 (open drain cover); *Gerzesky*, 403 Mich. 149 (man made pond filled with warm water creating deceptively thin ice in winter); *Herro v. Chippewa Co. Rd. Comm'rs.*, 368 Mich. 263 (1962) (breakthrough of flooding water); *Defnet v. Detroit*, 327 Mich. 254 (1950) (fumes from a blocked off sewer pipe leading to cave in backyard); *Rogers v. Kent Bd. of Co. Rd. Comm'rs.*, 319 Mich. 661 (1948) (county's failure to remove metal post); *Robinson v. Wyoming Twp.*, 312 Mich. 14 (1945) (property destroyed by fire caused by kerosene spill). Plaintiffs have not cited a single case where a nuisance was found in the absence of some tangible physical condition.

There is not the slightest connection in this case with any of the dangerous condition existing on land, highway, or in a building. The danger alleged was created entirely by a series of conversations and phone calls and no tangible manifestation of any condition ever emerged. Consequently, no nuisance has been alleged.

VII.

To summarize: Count I of plaintiffs' first amended complaint (violation of First Amendment right to a public education) is DISMISSED as to all defendants. Count II (violation of the right to be secure in one's person) is DISMISSED as to the school board and Deuel but not as

to Redding and Horning. Count III (state law negligence) is DISMISSED as to the school board and Deuel but not as to Redding and Horning. Counts IV (deprivation of right to control one's children) and V (failure to train and supervise) are DISMISSED as to all defendants.

The case will now proceed to trial as to Redding and Horning on counts II and III of the first amended complaint, as supplemented by the joint pre-trial statement. Counsel are directed to file their response to plaintiffs' proposed pre-trial order and their proposed jury instructions within thirty days from the entry of this order. The deputy clerk will schedule a final pre-trial conference thereafter.

SO ORDERED.

Dated: April 9, 1990

AVERN COHN
United States District Judge

§1983. Civil action for defamation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.